92-857

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

CARVEL GORDON DILLARD,
Petitioner

versus

SECURITY PACIFIC CORP.;
MERRILL LYNCH, PIERCE FENNER & SMITH, INC.;
SECURITIES INDUSTRY ASSOCIATION, INC.;
SECURITY PACIFIC BROKERS, INC.;
FINANCIAL CLEARING & SERVICES CORPORATION;
JENKINS & GILCHRIST (A PARTNERSHIP); and
JENKINS & GILCHRIST (A PROFESSIONAL CORP.)
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

VOLUME 1 of 2 VOLUME APPENDIX

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-2722

C.G. DILLARD,

Plaintiff-Appellant,

VERSUS

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC., et al.,

Defendants-Appellees.

No. 90-2761

CARVEL G. DILLARD,

Plaintiff-Appellant,

VERSUS

SECURITY PACIFIC CORP., et al.,

Defendants-Appellees.

No. 91-2135

CARVEL DILLARD,

Plaintiff-Appellant,

VERSUS

SECURITY PACIFIC BROKERS, INC., et al.,
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas

Before POLITZ, Chief Judge, BROWN and SMITH, Circuit Judges. JERRY E. SMITH, Circuit Judge:

In this consolidated appeal, Carvel Dillard challenges an order compelling arbitration of his 1985 case and orders dismissing his 1986 and 1988 cases. We affirm the order compelling arbitration, affirm in part the dismissals, and remand the 1986 and 1988 cases to the respective district courts.

I.

Carvel Dillard maintained an account with Merrill Lynch, Pierce, Fenner & Smith ("Merrill Lynch") for the purpose of trading securities. The brokerage agreement contained a provision by which the parties agreed to settle any disputes

through arbitration.[1] In December 1983, Merrill Lynch partially liquidated some stock held in Dillard's account -- an action Dillard claims it took over his objection.

Dissatisfied with Merrill Lynch, Dillard entered into an agreement with the Financial Clearing Services Corporation (FCSC), Security Pacific Brokers, Inc., and Security Pacific Corporation (collectively "Security Pacific")[2] on February 14, 1984, whereby Security Pacific agreed to purchase put and call options for Dillard upon request and Dillard agreed to open an account with Security Pacific and keep it fully margined. On February 16, 21, and 23, Dillard delivered to Security Pacific three drafts on his Merrill Lynch account

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[1] Although there appear to be several brokerage agreements between Merrill Lynch and Dillard, we refer to these as "the agreement" or "the contract."

[2] Security Pacific Brokers, Inc., and FCSC are subsidiaries of Security Pacific Corporation. Dillard dealt directly with Security Pacific Brokers, Inc., and FCSC.

totaling $56,256 to finance Security Pacific's trading on his behalf. Merrill Lynch failed to honor the drafts, however, as Dillard's account then had a deficit in excess of $5,000. On February 27, Dillard directed Security Pacific to purchase certain options. Security Pacific did not carry out this order; nor did it carry out a subsequent order for the same options at a different price.

Security Pacific sued Dillard to recover on the bad Merrill Lynch drafts. Although Dillard answered Security Pacific's complaint, he failed to comply with the court's discovery orders, and a default judgment was entered against him. After he filed his answer, Security Pacific (along with Merrill Lynch) instigated a criminal prosecution against him with regard to the bad drafts.

Dillard then filed three pro se federal lawsuits -- respectively, in 1985, 1986, and 1988 -- against Merrill Lynch,

Security Pacific, and other parties involved in the securities transactions and the criminal prosecution. All three of Dillard's lawsuits are at issue in this consolidated appeal.

A.

On July 16, 1985, Dillard filed suit ("the 1985 case") against Merrill Lynch, alleging that it had committed certain fraudulent acts in handling securities transactions on his behalf. His complaint alleged that Merrill Lynch violated section 17(a) of the Securities Act of 1933 ("the 1933 Act"), 15 U.S.C. 5 77q(a); section 10(b) of the Securities Exchange Act of 1934 ("the 1934 Act"), 15 U.S.C. $ 78j(b), and rule 10b-5 promulgated thereunder, 17 C.F.R. 5 240.10b-5; and the Texas Deceptive Trade Practices Act (DTPA), Tex. Bus. & Com. Code Ann. 17.41 et seq.

Merrill Lynch moved to dismiss the complaint for failure to state a claim as required by Fed. R. Civ. P. 12(b)(6); in

the alternative, it moved for a more definite statement on the ground that Dillard had failed to plead fraud with sufficient particularity as required by Fed. R. Civ. P. 9(b). In addition, Merrill Lynch moved to compel arbitration pursuant to the arbitration provisions of his trading agreement with Merrill Lynch and requested a stay pending arbitration.

Dillard then filed a "Motion To Declare Compulsory Arbitration Provisions of Defendant's Adhesion Contracts To Be Invalid, and Unenforceable and To Enjoin Enforcement of Same." In the motion, Dillard for the first time raised allegations of an antitrust conspiracy among brokerage firms to include arbitration clauses in all brokerage contracts.

On March 23, 1987, Judge Ross Sterling held a motions hearing. From the bench he ruled that Dillard had no private right of action under section 17(a) of the 1933 Act; that he had not properly pleaded a cause of

action under rule 10b-5; and that the claims he had properly pleaded were subject to arbitration and should be stayed pending arbitration. He also ruled that Dillard had not properly raised the requests for declaratory and injunctive relief in his pleading. Judge Sterling died before entering the order, and the case was assigned to Judge Sim Lake.

On February 1, 1990, Judge Lake "concur[red] with Judge Sterling's finding of a contract requiring arbitration and ordered the parties to begin arbitration within thirty days. He went on to state that Dillard had made no claim "that creates any question of law, equity or fact that cannot be arbitrated.[3] He also noted that Dillard's request for declaratory and

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[3] At the time of Judge Sterling's bench rulings, it was the law of this circuit that claims under the 1933 Act and the 1934 Act could not be arbitrated. Thus, Judge Sterlinqs dismissal of Dillards $ 17(a) and rule 10b-5 claims was a necessary prerequisite to the arbitration order. Soon thereafter, the Supreme Court held that claims under both federal acts are subject

injunctive relief was not properly raised in his pleadings, stating that "[p]laintiff's motions objecting to arbitration on the grounds of federal anti-trust law or adhesion contracts are irrelevant because they are beyond the scope of his pleadings. In addition, he denied Dillard's Motion for Findings of Fact and Conclusions of Law Concerning Injunctive Relief and Other Previously Filed Motions" that had been filed on October 11, 1989. Finally, he dismissed the entire action without prejudice.

On February 14, 1990, Dillard filed a motion under Fed. R. Civ. P. 59(e) to alter or amend the judgment. Although he took issue with the court's refusal to consider his antitrust allegations as a separate cause of action, he did not amend his

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to arbitration. See Rodriquez de Ouias v. Shearson/Am. Express, 490 U.S. 477, 482-84 (1989) (1933 Act); Shearson/Am. Express v. McMahon, 482 U.S. 220, 238 (1987) (1934 Act). Judge Lake accordingly entered an order compelling arbitration of all claims related to the trading transactions.

complaint to add these allegations. He also filed a motion for trial by jury. These motions were denied.

On March 3, 1990, Dillard initiated arbitration proceedings before the Chicago Board Options Exchange by filing a Statement of Claim, which was a copy of his first amended complaint in the 1985 case. The matter was referred to the National Association of Securities Dealers, which dismissed all of Dillard's claims after an arbitration hearing on January 4, 1991. Dillard now appeals, challenging the district court's arbitration order and dismissal of the case as well as its refusal to enter findings of fact and to enjoin the enforcement of the arbitration provisions.

B.

On August 20, 1986, Dillard filed his second federal lawsuit ("the 1986 case")

this time against Security Pacific.[4] In his original complaint, Dillard brought claims relating to (1) the securities transactions (under federal securities law) and (2) the criminal prosecution (under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq., and the Hobbs Act, 18 U.S.C. 5 1951; he also accused Security Pacific of "false swearing" and "bribery").[5]

On May 20, 1987, the court dismissed the suit on res judicata grounds. Judge Sterling reasoned that all of the claims asserted in Dillard's complaint should have been raised as compulsory counterclaims to Security Pacific's suit to recover on the bad Merrill Lynch drafts.

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[4] Dillard initially brought this case against Security Pacific Brokers, Inc., and FCSC. Later, as noted infra, he unsuccesfully attempted to add Security Pacific Corporation as a defendant.

[5] The false swearing, bribery, and Hobbs Act claims were brought as part of the RICO claim.

Dillard appealed, and on January 15, 1988, we affirmed the dismissal as to all claims arising prior to Dillard's answer to Security Pacific's complaint but reversed as to all claims arising after the answer was filed. Specifically, we concluded that the res judicata bar of the default judgment (entered after Dillard had failed to comply with discovery orders) did not encompass Dillard's claims arising out of the criminal prosecution, as the prosecution was instituted after Dillard filed his answer. Dillard v. Security Pacific Brokers, 835 F.2d 607, 609 (5th Cir. 1988) ("Dillard I"). We therefore vacated the dismissal as to Dillard's claims arising from the criminal prosecution and remanded for further proceedings.

Dillard filed a supplemental complaint on July 18, 1988. Judge James DeAnda, to whom the suit had been transferred, struck the supplemental complaint on August 2,

1988, reasoning that Dillard had failed to request leave to file. In his attempted supplemental complaint, Dillard added claims under the federal antitrust laws; he also accused Security Pacific of "malicious prosecution" and of "undertak[ing] an illegal, improper and perverted use of criminal process." Finally, he made accusations against Security Pacific Corporation (the parent company of Security Pacific Brokers, Inc., and the FCSC), Jenkens & Gilchrist (counsel for Security Pacific), Merrill Lynch, and the Securities Industry Association (SIA). The suit subsequently was transferred back to Judge Lake.

After a status conference on September 15, 1989, Judge Lake ordered Dillard to file an amended complaint by October 15, 1989. Dillard did not file an amended complaint; instead, he filed a motion for a stay pending our decision in the 1988 case discussed infra. Judge Lake granted the stay on October 27, 1989. We then disposed

of the first appeal of the 1988 case on May 22, 1988, and Judge Lake ordered Dillard to file an amended complaint by October 5, 1990, or face dismissal.

Dillard complied with Judge Lake's order. His amended complaint added Merrill Lynch, Jenkens & Gilchrist, and the Securities Pacific Corporation as defendants. He also brought claims for defamation, abuse of process, and malicious prosecution, as well as under "Title 42... of civil rights." He did not bring a claim under the federal antitrust laws, nor did he name SIA as a defendant.

In response, the defendants moved to dismiss the complaint under rule 12(b)(6). Judge Lake refused to allow Dillard to add Merrill Lynch, Jenkens & Gilchrist, and Security Pacific Corporation as defendants because "no leave was granted to add new parties." He specifically noted that the "newly added defendants" were dismissed without prejudice. He then dismissed (1)

the federal securities claims stemming from the trading transactions as res judicata on the grounds cited in our Dillard I opinion; (2) the defamation, malicious prosecution, and abuse of process claims as time-barred; (3) the Hobbs Act claim on the ground that the statute cited did not provide a private cause of action; and (4) the RICO and civil rights claims without prejudice for failure to state a claim. Dillard now appeals the district court's disposition of the case.

C.

Dillard filed a third federal lawsuit in 1988 ("the 1988 case") this time against Security Pacific Corporation, Security Pacific Brokers, Inc., FCSC, Merrill Lynch, SIA, and Jenkens & Gilchrist. He asserted antitrust claims against Merrill Lynch, Security Pacific, and SIA; and claims related to the criminal prosecution (i.e., defamation, abuse of process, malicious prosecution, RICO, and Hobbs Act claims) against Merrill Lynch, Security Pacific,

and Jenkens & Gilchrist. He also accused Merrill Lynch and the Security Pacific entities of wrongdoing with regard to the trading transactions.

All the defendants moved for dismissal under rule 12(b)(6). Merrill Lynch also moved to compel arbitration. Judge Hughes dismissed the case in three separate orders. Dillard appealed, and we remanded for the limited purpose of requiring the court to state its reasons for the dismissals.

On July 6, 1990, Judge Hughes issued his opinion explaining his earlier orders. First, he stated that the Security Pacific entities were dismissed because all the claims against them were pending in the 1986 case in Judge Lake's court. He then noted that SIA was dismissed for failure to state a claim against it. With regard to Jenkens & Gilchrist, he stated that the case would be abated until Judge Lake ruled on Dillard's motion to amend his complaint to add Jenkens & Gilchrist as a defendant

in the 1986 case. Finally, Judge Hughes noted that the case against Merrill Lynch was abated until Dillard received a negative ruling on a motion to amend his complaint in the 1985 case to include additional claims against Merrill Lynch. Dillard now challenges Judge Hughes's disposition of the case.

I.

We first consider Dillard's complaints with regard to the 1985 case. He claims that the district court erred in compelling arbitration of his claims, in denying his request for a jury trial, in denying his request for declaratory and injunctive relief, and in failing to enter findings of fact and conclusions of law in connection with the denial of declaratory and injunctive relief.

A.

Judge Lake found that the Dillard-Merrill Lynch contract required

arbitration[6] and that Dillard raised no claim "creat[ing] any question of law, equity or fact that cannot be arbitrated." He therefore ordered the parties to begin arbitration within thirty days and dismissed Dillard's claims without prejudice.[7] Dillard contends that the order compelling arbitration was improper. We disagree.

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[6] The contract states the following:

> It is agreed that any controversy between us arising out of your business or this agreement, shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange, Inc. or pursuant to the Code of Arbitration Procedure of the National Association of Securities Dealers, Inc., as the undersigned may elect.

[7] Dillard argues at length that the district court improperly dimissed his complaint for failure to state a claim. Although Judge Sterling noted from the bench that Dillard had failed to state a claim under the federal securities laws, Judge Lake explicitly dismissed the complaint without prejudice pursuant to the arbitration clause.

Section 2 of the Federal Arbitration Act ("the Act"), 9 U.S.C. § 1 et seq., declares that an arbitration clause involving interstate commerce is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The Act also provides that "[i]f the making of the arbitration agreement . . . be in issue, the court shall proceed summarily to the trial thereof." Id. § 4. In a case in which such a trial is required, the Act allows the party resisting arbitration to demand a jury trial. Id.

Dillard contends that he deserves a jury trial on the question of the validity of the arbitration clause.[8] He argues

[8] There is no quegtion that Dillard's substantive claims are arbitrable. See Rodricuez de Ouiias, 490 U.S. at 482-84 (1933 Act claims subject to arbitration); McMahon, 482 U.S. at 238 (1934 Act claims subject to arbitration); Commerce Park at DFW FreePort v. Mardian Constr. Co., 729 F.2d 334, 340 (5th Cir. 1984) (DTPA claims subject to arbitration). The only issue, then, is whether the arbitration clauses at issue in this case are enforceable.

essentially that he has put the "making of the arbitration" clause "in issue" by alleging that the clause is an unconscionable "adhesion contract." He contends that he had no choice but to accept the arbitration clause in the Merrill Lynch contract because the inclusion of the clause was nonnegotiable. He further alleges that he could not go elsewhere because the majority of brokerage firms use such terms in their contracts; he adds that such uniform use is the result of an antitrust conspiracy among brokerage firms.

A party to an arbitration agreement cannot obtain a jury trial merely by demanding one. Saturday Evening Post Co. v. Rumbleseat Press, 816 F.2d 1191, 1196 (7th Cir. 1987). The party resisting arbitration bears the burden of showing that he is entitled to a jury trial under § 4 of the Arbitration Act." Bhatia v. Johnston, 818

F.2d 418, 422 (5th Cir. 1987).[9] Our caselaw has not established the precise showing a party must make. We have, however, suggested that the party must make at least some showing that under prevailing law, he would be relieved of his contractual obligation to arbitrate if his allegations proved to be true. In addition, he must produce at least some evidence to substantiate his factual allegations. T & R Enters. v. Continental Grain Co., 613 F.2d

[9] Under Supreme Court precedent, a party must challenge the making of the agreement to arbitrate" itself in order to create a jury-triable issue. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967). If the party makes allegations regarding the contract as a whole -- e.g., that the brokerage contract is a contract of adhesion -- that issue must go to arbitration. Id. In most cases in which a customer seeks to avoid arbitration by alleging that the contract is one of adhesion, he fails to allege specifically that the arbitration clause is adhesive. See, e.g., Bhatia, 818 F.2d at 422. Dillard has met this threshold requirement, for he focuses specifically on the arbitration provision as an adhesive term.

substantiate his factual allegations. T & R Enters. v. Continental Grain Co., 613 F.2d 1272, 1278 (5th Cir. 1980).[10]

We affirm the district court's order to arbitrate on the ground that Dillard failed to make a sufficient showing that the arbitration provision at issue should not be enforced. Adhesion contracts are not automatically void. Instead, the party

[10] In T & R Enters., the party seeking to avoid arbitration put the existence of the arbitration agreement "in issue" by alleging that although he had signed the agreement, the true agreement between the parties was reached during a telephone converation in which arbitration was not discussed. First, we rejected this argument as "contrary to the universally prevailing rule that . . . one who executes a written contract is bound by its terms." Id. We also noted that we were "rather persuaded" by Almecenes Fernandez, S.A. v. Golodetz, 148 F.2d 625, 628 (2d Cir. 1945), which held that not only must a party deny that he made an agreement to arbitrate, but evidence must be produced to substantiate the denial. Id. See also Interbras Cayman Co. v. Orient Victory Shipping Co., S.A., 663 F.2d 4, 7 (2d Cir. 1981) (reaffirming Almecenes Fernandez).

seeking to avoid the contract generally must show that it is unconscionable. See 6A Arthur L. Corbin, Contracts $ 1376 at 20-21 (1962) and 7-9 (1991 Supp.). Several federal courts have considered and rejected the argument that agreements to arbitrate disputes in the securities context are unconscionable as a matter of law. As explained by the Ninth Circuit,

> The strong federal policy favoring arbitration, coupled with the extensive regulatory oversight performed by the SEC in this area, compel the conclusion that agreements to arbitrate disputes in accordance with SEC-approved procedures are not unconscionable as a matter of law.

Cohen v. Wedbush Noble, Cooke, Inc., 841 F.2d 282, 286 (9th Cir. 1988). See also Adams v. Merrill Lynch, Pierce. Fenner & Smith, 888 F.2d 696, 700 (10th Cir. 1989); Surman v. Merrill Lynch, Pierce, Fenner & Smith, 733 F.2d 59, 61 n.2 (8th Cir. 1984). In addition, Dillard failed to produce any evidence that the agreement to arbitrate was somehow unfair or oppressive in this case.

Moreover, the allegations of antitrust conspiracy do not lead to the conclusion that the Merrill Lynch contract was an unconscionable contract of adhesion. Even if the district court were to find that such an antitrust conspiracy existed, this finding would not compel the invalidation of the agreement to arbitrate; instead, it would lead to an award of damages for any injury stemming from the anticompetitive behavior.[11] Thus, because Dillard failed to show the existence of a genuine issue of

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[11] Section 4 of the Clayton Act, 38 Stat. 731, a amended, 15 U.S.C. S 15(a), provide that any person "injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained ... "

fact to be tried before a jury, we affirm the district court's arbitration order and dismissal without prejudice.[12]

B.

In his "Motion To Declare Compulsory Arbitration Provisions of Defendant's Adhesion Contracts To Be Invalid, and Unenforceable and To Enjoin Enforcement of Same," Dillard attempted to set forth his antitrust conspiracy allegations as separate causes of action.

Judge Lake did not deny this "motion" as Dillard contends; instead, he refused to

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[12] In addition to alleging that he was denied his statutory right to a jury trial, Dillard claims he was deprived of his right to a jury trial under the Seventh Amendment. This argument is without merit. In McMahon, the Court endorsed enforcing agreements to arbitrate statutory claims unless Congress has prohibited waiver of a judicial forum for the particular claim at issue. 482 U.S. at 226-27. We conclude from this that the Seventh Amendment does not preclude "waiver" of the right to jury trial through the signing of a valid arbitration agreement.

consider Dillard's request for declaratory and injunctive relief because Dillard did not properly request such relief in his pleadings.

In order to obtain a permanent injunction or a declaratory judgment, a party must make his request for such relief in his pleadings. Fed. R. Civ. P. 8(a). Dillard's complaint failed to make such a request. Moreover, there was no indication that Dillard was requesting temporary or preliminary relief -- a request that can be made in a motion. 11 Charles A. Wright, et al., Federal Practice and Procedure § 2949 at 467 (1973). Therefore, Judge Lake properly refused to consider Dillard's allegations apart from Dillard's attack on the validity of the arbitration clauses per se.[13]

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[13] Dillard claims that he was entitled to finding of fact with regard to the denial of injunctive and declaratory relief. Fed. R. civ. P. 52(a) require such findings in "actions tried upon the facts without a jury" and with regard to "granting or

III.

With regard to the 1986 case, Dillard contends that the district court erred in dismissing his defamation, malicious prosecution, and abuse of process claims as time-barred and in dismissing his civil rights and RICO claims for failure to state a claim.[14] These grounds of error are addressed below.

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refusing interlocutory injunctions." Neither situation was present in this case. First, no action was tried to the court without a jury. Judge Lake ordered the parties to commence arbitration; he settled no substantive claims. Second, Dillard did not make a request for an "interlocutory injunction." Rather, he requested a declaratory judgment and permanent relief from his obligations under the arbitration clause.

[14] Dillard also challenges the district court's refusal to allow him to add Merrill Lynch, Jenkens & Gilchrist, and Security Pacific Corporation as new party defendants. This refusal was proper, as he failed to request leave of court.

In addition, Dillard attacks the district court's dismissal of his allegations and claims related to the trading transactions. Those claims are barred by Dillard I, however, and were properly dismissed. Finally, we do not consider the court's dismissal of Dillards Hobb Act claim, as he does not raise it as a ground for error.

A.

Dillard filed his original complaint in this suit on August 20, 1986, accusing Security Pacific[15] of "[f]alse [s]wearing" and "brib[ing] a law enforcement officer" in connection with the filing of criminal charges against him. He also alleged that [t]he false criminal charge was one of a number of outrageous actions done by defendant[] to harass and oppress" him. These charges were based upon the fact that "[i]n August 1984 defendant[] made a knowingly false affidavit charging theft by plaintiff . . . ." At the time of the filing of his 1986 complaint, Security Pacific had complained to the authorities, and an indictment had been issued on August 19, 1985.

Several events occurred after the filing of this original complaint. The

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[15] As noted supra, the 1986 case started and ended as a case against FCSC and Security Pacific Brokers, Inc.

indictment was quashed on September 16, 1987. On that same day, a second indictment was issued but was dismissed on June 21, 1988. On July 18, 1988, Dillard filed his supplemental complaint (which was stricken for failure to ask leave of court to file it) alleging a "pattern of baseless repetitive claims" constituting "a badge of malicious prosecution." He also alleged "an illegal, improper and perverted use of criminal process."

Dillard specifically raised abuse of process, malicious prosecution, and defamation causes of action on October 5, 1990, in his first amended complaint, which he filed after we remanded to the district court to consider Dillard's claims arising from the criminal prosecution in Dillard I. The district court used the date of the first amended complaint October 5, 1990 for purposes of calculating the timeliness of Dillard's malicious prosecution, abuse of process, and defamation causes of action and found that all three were time-barred.

Use of this tolling date would be erroneous, however, if the claims in the amended complaint stemmed from the same "transaction or occurrence" addressed by the original complaint. In such a case, the amended complaint would "relate back" to the filing of the original complaint. Under Tex. Civ. Prac. & Rem. Code $ 16.068,[16] which is similar to Fed. R. Civ. P. 15, the limitations period is tolled by the first pleading related to the transaction or occurrence:

> If a filed pleading relates to a cause of action, cross action, counterclaim, or defense that is not subject to a plea of limitation when the pleading is filed, a subsequent amendment or supplement to the pleading that changes the facts or grounds of liability or defense is not subject to a plea of limitation unless the amendment or supplement is wholly based on a new, distinct, or different transaction or occurrence.

Texas courts have employed section 16.068 both to save defective pleadings and to

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[16] Under Erie R.R. v. Tompkin, 304 U.S. 64 (1938), we must evaluate the state of limitations issues in accordance with Texas law.

allow amendments alleging separate but related bases of recovery.[17] Thus, the inquiry is not whether an amended complaint adds a new or different cause of action; rather, it is whether that new or different cause of action is wholly based upon, and grows out of, a new, distinct, or different transaction or occurrence. Meisler v. Republic of Tex. Sav. Assn, 758 S.W.2d 878, 882 (Tex. App. -- Houston [14th Dist.] 1988, no writ).

As the record now stands, we cannot discern whether the defamation, abuse of process, and malicious prosecution claims grew out of a "wholly . . . new, distinct, or different transaction or occurrence." We thus remand the timeliness issue to the

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[17] See, e.g., Abbott v. Fov, 662 S.W.2d 629, 631 (Tex. App.-- Houston 114th Dist.] 1983, writ ref'd n.r.e.) (amendment cured defective complaint); Bradley v. Etessam, 703 S.W.2d 237 (Tex. App. -- Dallas 1985, writ refd n.r.e.) (amendment adding wrongful death cause of action related back to original complaint alleging medical malpractice).

district court for consideration of the relation-back issue. We also cannot discern from the district court's opinion whether Dillard properly raised the relation-back issue.[18] If he did not, we cannot consider the issue on appeal, see Way v. Reliance Ins. Co., 884 F.2d 866, 868 n.3 (5th Cir. 1989); thus, there would be no need for the district court to address the issue on

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[18] There is only one sentence in the district court's opinion that touches on the issue, where the court states that "Dillard asserts that because the [defamation] cause of action based upon the second indictment was timely raised in the 1988 case], it is not time-barred in this action." This is similar to Dillard's ground for error before this court. Although he does not specifically raise the Texas "relation back" statute, he does ask us to consider the "earliest pleading in any action as tolling the statute" of limitations. We believe this is sufficient (but just barely) to raise the "relation back" issue for appellate review, as Dillard asks us to consider "any" pleading -- which could include earlier pleadings in the 1986 case -- in addressing the statute of limitations question. It appears from the district court's recitation of Dillard's argument that he did not make a similar request to the district court. We leave it to the district court, however, to answer this question.

remand, for its opinion on the timeliness issue would have become final.

B.

We agree with the district court that Dillard failed to state a claim under either RICO or federal civil rights law.[19] Dillard argues, however, that when read in conjunction, his 1985, 1986 and 1988 complaints (and amendments thereof) do state a claim.

We decline Dillard's invitation to read all of his complaints together. This tangled web of litigation is of his own making. Thus, we do not agree that "substantial justice" requires us to hold, as he suggests, that "if a cause of action is properly plead[ed] in any action or in any combination of actions it is properly plead[ed]."

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[19] The district court held that although "[i]t is perhaps possible that a RICO claim may lie buried somewhere" in Dillard's complaint, it could not find it. After examining Dillard's complaint, we agree and affirm the dismissal.

IV.

Finally, with regard to the 1988 case, Dillard argues that the district court erred in dismissing SIA from the suit for failure to state a claim against it, in abating the suit against Merrill Lynch and Jenkens & Gilchrist, and in dismissing the Security Pacific entities on the ground that similar claims were pending against them in Dillard's 1986 case.

A.

Dillard's sole complaint against SIA is its involvement in the alleged antitrust conspiracy.[20] In his 1988 suit, Dillard repeats the allegations he raised in his injunction motion in the 1985 suit. Essentially, he points to the fact that the vast majority of brokerage agreements contain arbitration clauses and alleges that those clauses are the result of an

[20] In his complaint, Dillard states in his prayer for relief "[t]hat S.I.A. would be found guilty only of anil-trust law violations."

antitrust conspiracy in the brokerage industry.

Judge Hughes dismissed SIA because Dillard failed to state an antitrust claim against it. As Judge Hughes noted,

> The Association could have been a clearinghouse for price fixing information, but Dillard did not make that allegation. The Association is not a market participant, and Dillard failed to allege facts that it was a conduit for conspiratorial anti-competitive pricing or monopolization. This lack of sufficient factual allegations constitutes failure to state a claim against the Association for antitrust violations.

In paragraph 22 of his complaint, however, Dillard made the precise allegation Judge Hughes thought was missing. In that paragraph, Dillard alleged the following:

> Defendants and their co-conspirators, in order to effect monopolization, acted with the intention that services be unavailable except on similar unfair terms[;] and legal seminars, and <u>legal bulletins of the conspirators' trade association S.I.A. and other exchanges of information on model arbitration clauses</u> and their intent to use them caused each individual company to know that others would act in conjunction with it to restrain the trade of those who refused to arbitrate.

Although the allegations connecting SIA to the conspiracy are somewhat inartful, there is no question that Dillard made them.

SIA seems to acknowledge this in its brief, for it restates Dillard's allegations that it acted as a clearinghouse for anti-competitive information.[21] SIA, therefore, argues that there are two additional deficiencies in Dillard's complaint: Dillard (1) failed to allege an agreement or conspiracy among the brokerage firms; and (2) failed to allege facts to show how he has been economically damaged.

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[21] As SIA notes, "Dillard asserts that SIA disseminated information about the use of [model arbitration clauses] to its members, and that each member understood from that information that it could use [the model arbitration clauses] without fear of losing business to other brokers because all brokers would necessarily use [the model clauses] as nonnegotiable contract terms.

1.

Section 1 of the Sherman Act[22] proscribes "[e]very contract, combination... or conspiracy [] in restraint of trade or commerce . . . . " 15 U.S.C. $ 1. In order to state a claim for a violation of Section 1, a plaintiff must allege (1) the existence of a conspiracy (2) affecting interstate commerce (3) that imposes an "unreasonable" restraint of trade. White & White v. Am. Hosp. Supply Corp., 723 F.2d 495, 504 (6th Cir. 1983). Contrary to SIA's assertions, Dillard alleged "the existence of a conspiracy" in several places in this complaint. For example, in paragraph 19, he charges a

> conspiracy by Defendants and their competitors in violation of the Sherman Anti-Trust Act by the Defendants in adopting and agreeing to use, and in using exclusively certain uniform contracts for securities trading containing provisions for the determination by arbitration of all claims and controversies arising under said contracts.

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[22] Dillard also brings a claim under section 2. His claim, however, is more appropriately considered under section 1.

Dillard goes on to allege that the defendants "acted with the intention that services be unavailable except on similar unfair terms." Essentially, Dillard asserts that SIA disseminated information about the use of arbitration clauses; from that dissemination, he argues, each member of the SIA understood that it could use the arbitration clause in its contracts without fear of losing business.[23]

SIA argues that Dillard alleges nothing more than "conscious parallelism" in the industry, which is not enough to state a claim for conspiracy. In particular, Dillard states that he "will

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[23] He models his complaint after Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930), in which competitors in the film industry agreed to use a standard form contract containing an arbitration clause in their dealings with movie theaters. If a theater owner failed to submit disputes to an industry-controlled arbitration panel, or if he refused to abide by an arbitration award, the industry conspirators would refuse to do buiness with him again until he put up a security deposit, arbitrated the dispute, or abided by the arbitration award.

show the similarity of behavior can, under the facts, only be attributed to an understanding among securities industry competitors to effect the restraint." SIA is correct when it asserts that proof of parallel business behavior is insufficient to prevail on a Sherman Act claim. See Theatre Enters. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954). But SIA seems to confuse the standard for withstanding summary judgment with the standard for defeating a rule 12(b)(6) motion.

Dillard does not need to "off[er] any plausible reason for defendants to have conspired," as SIA suggests. He merely needs to allege that they did indeed conspire and give some factual allegations that would support such a claim. See McCleneghan v. Union Stock Yards Co., 298 F.2d 659, 663 (8th Cir. 1962) (plaintiff needs to make more than an allegation of conspiracy; he must make a statement of

facts constituting the conspiracy). Dillard does this by alleging that the defendants attended seminars and conferences at which arbitration clauses were discussed and that they adopted such clauses knowing that they could do so without fear of competition.

2.

Section 4 of the Clayton Act, which provides the private right of action to enforce the Sherman Act, requires that the antitrust plaintiff seek recovery for injury "in his business or property." 38 Stat. 731, as amended, 15 U.S.C. § 15(a). Dillard alleges that [t]here has been injury to MR. DILLARD'S business and to his property because of duress of threat to restrain trade of Plaintiff lest he sacrifice right of recovery by judicial determination . . . ." SIA argues that the dismissal for failure to state a claim was proper because Dillard "alleged no facts to show how he has been economically damaged.

Contrary to SIA's suggestion, Dillard need not show how he was damaged at this point, however. The fact is that he alleged that his business and property were injured. This is sufficient to satisfy the requirements of notice pleading.[24] We therefore reverse the district court's dismissal of SIA for failure to state a claim against it.[25]

B.

Judge Hughes abated the claims against Merrill Lynch "until Dillard moves to, and receives a negative ruling on a motion to, amend his complaint" in the 1985 case to add the claims asserted in his 1988 complaint. In his 1985 complaint, Dillard

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[24] SIA does not contest the sufficiency of Dillard's complaint as to pleading unreaonable retraint or interstate commerce; thus, we do not consider these issues.

[25] We leave it to Judge Huqhes on remand to survey the procedural landscape of this case and to decide whether Dillard's claim against SIA should go forward in his or another court.

alleged that Merrill Lynch violated the federal securities laws as well as the DTPA. In that complaint he did not state claims arising from the criminal prosecution or in connection with the alleged antitrust conspiracy (Judge Lake refused to consider Dillard's antitrust allegations as a separate cause of action because he did not properly raise them in his pleadings.)

It was within Judge Hughes's discretion to abate the claims pending in his court with the hope that Dillard would consolidate all his claims against Merrill Lynch in one forum. We have expressly noted in the past that a stay[26] "pending the outcome of litigation between the same parties involving the same or controlling

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[26] An abatement can be either a stay or a dismissal. Baer v. Fahnetock & Co., 565 F.2d 261, 263 (3d Cir. 1977). In this case, the abatement should be considered a stay, given that Judge Hughes abated the case only until the occurrence of a specific event -- Dillard's attempt to add his 1988 claims to the 1985 case.

issues is an acceptable means of avoiding unnecessary du[illegible]tion of judicial machinery." ACF Indus. v. Guinn, 384 F.2d 15, 19 (5th Cir. 1967), cert. denied, 390 U.S. 949 (1968).

At the time of Judge Hughes's order, Dillard had filed a motion to amend the judgment in the 1985 case that raised the antitrust claims but not the claims related to the criminal prosecution; the latter were, however, raised in the first amended complaint in the 1986 case. Since that time, Judge Lake has denied the motion to amend judgment in the 1985 case. He also refused to allow Dillard to add Merrill Lynch to the 1986 case on the ground that Dillard failed to ask leave of court to add new defendants. The question is, then, whether Dillard has complied with Judge Hughes's request.

Merrill Lynch correctly points out that Dillard never attempted to file a motion to amend his 1985 complaint. Dillard's motion to amend judgment in that

case (which raised only the antitrust claims) was pending at the time, however. Considering Dillard is pro se, this is enough for substantial compliance with Judge Hughes's request.

Similarly, Dillard attempted to add Merrill Lynch to his 1986 case, in which Dillard's claims stemming from the criminal prosecution were pending. Judge Hughes, however, had asked him to amend his 1985 complaint. Again, especially considering that both the 1985 and the 1986 cases are assigned to Judge Lake, this appears to be substantial compliance. In sum, we affirm Judge Hughes's abatement of the case. Because Dillard substantially complied with Judge Hughes' request, he is free to return to Judge Hughes's court with his claims. At that time, Judge Hughes can survey the procedural landscape and make further orders, if necessary.

C.

It was within Judge Hughes's discretion to abate the case against Jenkens & Gilchrist pending a decision on Dillard's motion to amend his complaint in the 1986 case to add it as a defendant. Dillard did attempt to add Jenkens & Gilchrist, but his request was denied because he failed to seek leave of court to file a motion to add new party defendants. Again, considering Dillard is pro se, he has substantially complied with Judge Hughes's order. Dillard is now free to return to Judge Hughes's court with his claims against Jenkens & Gilchrist, and Judge Hughes may make further orders as appropriate.

D.

Judge Hughes dismissed the claims against Security Pacific Corporation, Security Pacific Brokers, Inc., and FCSC, reasoning that all the claims were still pending in the 1986 case. At the time of

Judge Hughes's decision, the following had occurred in the 1986 case: We had affirmed the district court's dismissal of Dillard's claims relating to the trading transactions as res judicata; Dillard had filed his supplemental complaint on remand; Judge DeAnda had stricken the supplemental complaint for failure to request leave of court to file it; and Judge Lake had granted a stay pending the first appeal of this (the 1988) case. Dillard had not yet filed his first amended complaint, and when he did so later, he did not raise any antitrust claims against the Security Pacific entities. Thus, Judge Hughes was incorrect in his assumption that all Dillard's claims against Security Pacific were pending in the 1986 case; the antitrust claims were not.

We assume that Judge Hughes's dismissal was with prejudice.[27] The effect of Judge Hughes's dismissal of the Security Pacific entities is to preclude Dillard from adding the antitrust claims to the 1986 case. We therefore reverse the dismissal of the antitrust claims as an abuse of discretion. A more appropriate course of action would have been to abate the antitrust claims against the Security Pacific entities until Dillard sought and obtained a negative ruling on a motion to amend his 1986 complaint.

With regard to Dillard's duplicative claims (i.e., those brought against Security Pacific in both the 1986 and the 1988 cases), it was within Judge Hughes's broad discretion to stay them pending the outcome of the 1986 case or to dismiss them

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[27] This is because Judge Hughes did not state otherwise. In addition, Security Pacific assumes that the dismissal was with prejudice, as it argues alternative ground for affirming the dismissal with prejudice, such as statute of limitations and res judicata.

without predjudice. See West Gulf Maritime Ass'n v. ILA Deep Sea Local 24, 751 F.2d 721, 729 & n.1 (5th Cir. 1985). See also First City Nat'l Bank & Trust Co. v. Simmons, 878 F.2d 76, 80 (2d Cir. 1989) (affirming dismissal without prejudice).[28] Dismissal with prejudice, however, would be an abuse of discretion. The 1986 case would have no res judicata or collateral estoppel effect on the 1988 case until it

[28] The West Gulf and First City cases deal with the so-called first-to-file rule, which comes into play when a plaintiff files similar lawsuits in two different federal districts. We have held that to avoid duplicative litigation, "a district court may dismiss an action where the issue presented can be resolved in an earlier-filed action pending in another district court." West Gulf, 751 F.2d at 729. The first-to-file rule hold that "[i]n the absence of compelling circumstances, the Court initially seized of a controversy should be the one to decide whether it will try the case." 909 Corp. v. Village of Bolingbrook Police Pension Fund, 741 F. Supp. 1290, 1292 (S.D. Tex. 1990) (citation omitted). The same concern with avoiding duplicative litigation is present where similar suits have been filed in two courts within the same district, as is the case here.

came to final judgment, which it had not at the time of Judge Hughes's order; thus, dismissal with prejudice was improper.

Security Pacific would like us to affirm the dismissal because Dillard could have brought all his claims (including the antitrust claim) in the first amended complaint in the 1986 case. This reasoning does not lead to a dismissal with prejudice, however; instead, it argues for an abatement, stay, or dismissal without prejudice. Again, we leave it to Judge Hughes to evaluate the status of Dillard's litigation and make further orders, if necessary.

V.

Dillard has filed several motions to consolidate his cases all of which have been denied. Consolidating actions in a district court is proper when the cases involve common questions of law and fact and the district court finds that it would avoid unnecessary costs or delay. St.

Bernard Gen. Hosp. v. Hosp. Serv. Ass'n, 712 F.2d 978, 989 (5th Cir. 1983), cert. denied, 466 U.S. 970 (1984); Fed. R. Civ. P. 42. The power of the district court to consolidate is purely discretionary. St. Bernard, 712 F.2d at 989. We therefore affirm the various denials of Dillard's motions to consolidate. Given consolidation of the three cases on appeal, however, we suggest that Dillard renew his request for consolidation with the district courts in the 1986 and 1988 cases. See e.g., St. Bernard, 712 F.2d at 990 (asking the district court to reconsider - although not reversing for abuse of discretion -- its denial of motion to consolidate antitrust cases).

VI.

In summary, in the 1985 case, we AFFIRM the district court in all respects. In the 1986 case, we AFFIRM the district court in all respects except for the dismissal of the defamation, malicious

prosecution, and abuse of process claims; with regard to those claims, we REMAND for consideration of the "relation back" issue if that issue was properly raised. In the 1988 case, we REVERSE the district court's dismissal of SIA; REVERSE the dismissal with prejudice of the Security Pacific entities; AFFIRM the abatement of claims against Merrill Lynch and Jenkens & Gilchrist; and REMAND the case for further consideration. We also DENY Dillard's other requests and motions, including his motion for sanctions. Finally, we emphasize that in remanding we express no view regarding whether any of Dillard's claims are meritorious.

CIVIL DOCKET SHEET
H-85-4135

PLAINTIFF	DEFENDANT
C. G . DILLARD	MERRILL, LYNCH, PIERCE, FENNER & SMITH, Inc.

DATE	NR.	PROCEEDINGS
7-16-85	1	ORIGINAL COMPLAINT, filed.
7-16-85		SUMMONS (1) issued to deft.
7-25-85	2	RETURN SUMMONS served to Deft on 7-18-85, filed. rj Dkt'd 7-26-85
8-16-85	3	Deft's MOTION TO DISMISS Pltfs' Complaint, or in the Alternative, FOR A MORE DEFINITE STATEMENTS, filed. rj Dkt'd 8-19-85 M/D Aug 26, 1985 by Counsel.
8-16-85	4	Defts' MEMORANDUM In Support of Motion to Dismiss, filed. rj Dkt'd 8-19-85
8-27-85	5	Deft's Motion for Stay Pending Arbitration & Motion to Compel Arbitration, filed, kk dkt'd 8-28-85 OPPOSED M/D by clerk Sep 23, 1985
8-27-85	6	Defts' Memorandum of Law In Support of Motion for Stay pending Arbitration and Motion to Compel Arbitration, filed, kk dkt'd 8-28-85
8-29-85	7	Deft's Addendum to Deft's Motion for Stay Pending Arbitration and Motion to Compel Arbitration, filed, kk dkt'd 8-30-85

8-23-85	8	Pltf's Motion for Leave to Amend Complaint, filed, kk dkt' 9-5-85 (No stmt) M/D by clerk Sept 23, 1985
8-27-85	9	Deft's RESPONSE to Pltf's Motion for Leave to Amend Complaint, filed kk dkt'd 9-5-85
9-3-85	10	Pltf's RESPONSE to Deft's Motion for Stay and to Deft's Motion to Compel Arbitration and In Support of Pltf's Motion to Amend Complaint, filed, kk dkt'd 9-5-85
9-5-85	11	Deft's REPLY to Pltf's Response to Deft's Motion for Stay and to Deft's Motion to Compel Arbitration, filed, kk dkt'd 9-6-85
9-11-85	12	Pltf's REPLY to Deft's Reply to Pltf's Response to Deft's Motion for Stay and to Deft's Motion to Compel Arbitration, filed, kk dkt'd 9-12-85
9-11-85	13	Pltf's Motion to Declare Compulsory Arbitration Provisions of Deft's Adhesion Contracts to be Invalid, and Unenforceable and to Enjoin Enforcement of Same, filed, kk dkt'd 9-12-85 OPPOSED M/D by clerk Oct 7, 1985

9-19-85	14	Deft's MEMORANDUM in Opposition to Pltf's Motion to Declare Compulsory Arbitration Provisions of Deft's Adhesion Contracts to Be Invalid, and Unenforceable and to Enjoin Enforcement of Same, filed, kk dkt'd 9-20-85
9-27-85	15	Pltf's MEMORANDUM in Support of Pltf's Motion to Declare Compulsory Arbitration Provisions of Deft's Adhesion Contracts to be Invalid and to Enjoin Enforcement of Same, filed, kk dkt'd 9-30-85
11-1-85	16	(JVS) NOTICE, setting Motion/Scheduling conf on 3-17-85 @ 10:00am, filed. Parties ntfd. mb/mcs Dkt'd 11-5-85
11-22-85	17	Pltf's Motion to Compel Deft to Answer Complaint and motion to Move that the Court Shall Rule on all Outstanding Motion on Dec 2, 1985 filed, dwt (opposed) M/D by clerk Dec 9, 1985 Dktd 11-25-85
11-27-85	18	Deft's MEMORANDUM in Opposition to Pltfs' Motion to Compel Deft to Answer Complaint, filed, kk dkt'd 12-2-85
12-9-85	19	Pltf's Proposal For Settlement, filed, dwt Dktd 12-10-85

2-27-86	20	Notice of Resetting - mailed to all counsel. mb/db Case is reset to Jun 16, 1986 at 11:00 a.m. For Motion & Scheduling Conference. dkt'd 3-4-86
4/24/86		Case transferred to Judge Sterling in exchange for H-85-2947. Parties ntf'd jr dkt'd 4/30/86
7/10/86	21	Pltf's MOTION FOR JUDGMENT BY DEFAULT JUDGMENT, filed. jr M/D Aug 4, 1986, by clerk. dkt'd 7/11/86
7/23/86	22	Deft's MEMORANDUM in Opposition to Pltf's Motion for Judgment by Default, filed. jr dkt'd 7/24/86
8-15-86	23	Pltf's MEMORANDUM SHOWING ADDITIONAL DEFAULT BY DEFT, filed, jgm Dktd 8-16-86
2-2-87	24	Pltf's MOTION TO COMPEL deft to Answer 1st Amended Complaint because of 1934 Act Claims, filed. M/D Feb 23, 1987 by clerk. dkt'd 2-5-87
3/30/87	25	TRANSCRIPT OF PROCEEDINGS on March 23, 1987, before Judge Sterling, filed. jr (LOOSE IN FILE) dktd 4/1/87
3/23/87		(RNS) MOTION CONFERENCE, minutes filed. jr (Rptr: J. Schaefer Appearances: C.J. Dillard, pro se: Karl Stern f/deft 1. Pltf's Motion for leave to Amend GRANTED. Pltf's First Amended Complaint is

		considered Filed. 2. Pltf's Motion for Default is DENIED. 3. Pltf Sec. 17a claims dismissed 4. Pltf has not adequately plead R.106-S. Case STAYED pending arbitration. 5. Deft to submit copy of the ordr. rec'd and dkt'd 4/6/87
4/10/87	27	Pltf's MOTION FOR TRIAL BY JURY RESTRICTED TO SPECIFIC ISSUE OF THE ARBITRATION AGREEMENT, filed. jr (OPPOSED) M/D 4/20/87 by counsel dkt'd 4/13/87
4/20/87	28	Pltf's ADDENDUM to pltf's Motion for Trial by Jury Restricted to Specific Issue of the Arbitration Agreement, filed. jr dktd 4/22/87
2/11/88	29	Pltf's MOTION FOR FINDING OF FACT AND CONCLUSION OF LAW CONCERNING INJUNCTIVE RELIEF AND OTHER PREVIOUSLY FILED MOTIONS, filed. jl dktd 2-16-88
3-4-88	30	DEFTS RESPONSE TO PLTF'S MOTION FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW CONCERNING INJUNCTIVE RELIEF AND OTHER PREVIOUSLY FILED MOTIONS, filed. jlp dkt'd 3-9-88 w/exhibits
4-11-88	31	(KKB) ORDER, filed. Parties ntfd. jl Case is transferred to docket of U.S. Magistrate G.A. Kelt, Jr. A status conference will be set at a later date. dktd 4-12-88

8-22-88	32	Pltf's PETITION TO THE CHIEF JUDGE, filed. jl Dktd 8-23-88 (with request for Hearing Sep 21, 88 before Judge DeAnda)
9-8-88	33	(JDA) ORDER, filed. Parties ntfd. jl Pending is Pltf's Petition to the Chief Judge, which Court construes to be a motion to consolidate this action with H-86-3251 and H-88-2848. Motion should properly be directed to Hon. G.A. Kelt, Jr. dktd 9-13-88 jl
12-19-88	34	(GAK) ORDER, filed. Parties ntfd Pltf's Motion to consolidate DENIED. dktd 12-19-88 rt
4-20-89		Rec'd & fwd to crd COPY OF LETTER re. Odom not attny of record for pltf. Dillard listed as pro se. jlp EOD 4-21-89
4-7-88		Case referred to Judge Kelt for hearing on outstanding motions. dm/kg
5-30-89	35	Pltf's NOTICE OF CONSOLIDATED APPEAL to order removal of stay pending arbitration, filed. bw dkt'd 6-2-89
5-30-89		Filing & Docketing Fees BOTH Paid. (Rec't 327485) bw
6-15-89	36	Pltf's DESIGNATION OF RECORD OF CONSOLIDATED APPEAL, filed. bw (Entire File)
6-29-89	37	Pltf's TRANSCRIPT ORDER FORM advising that the transcript is already on file in the Clerk's Office, filed. bw dkt'd 7-14-89

7-5-89	38	Pltf's Addenda to Notice of Consolidated Appeal and Notice of Appeal under 29 U.S.C. Section 1292 (S) Motion for Permission to Appeal Under 29 U.S.C. Section 1292 (B), filed. bj eod 7-20-89
8-16-89	39	Certified copy of ORDER by Court of Appeals on Aug 9, 1989, DISMISSING the Appeal and Pltf's request for removal of the stay and for injunctive relief are DENIED as moot, filed. mac
9-6-89	40	(SL) ORDER, entered. Parties ntfd. dj Parties to file, w/i 30 days, an agreed statement describing the status of arbitration & when it will be concluded.
10/6/89	41	REPORT on Status of Arbitration, filed eod 10/10/89 jd
10-11-89	42	C. G. Dillard's RESPONSE to The Courts Order of Sept. 6, 1989, filed. eod 10-16-89 mf
10-30-89	43	Certified copy of ORDER by CCA DENYING the petition for rehearing and the pltf's request that the CCA treat his notice of appeal as a petition for writ of mandamus is DENIED, filed. km

2/1/90	44	(SL) ORDER, entered, Parties ntfd. br Parties are Ordered to begin arbitration w/i 30 days of the entry of this Order, & this action is DISMISSED w/o prejudice. 2/1/90 br
2/1/90	45	(SL) FINAL JUDGMENT, entered. Parties ntfd. This action is DISMISSED. This is a FINAL JUDGMENT. 2/1/90 br
2/14/90	46	Pltf's RULE 59 MOTION TO ALTER & AMEND the Courts Orders of Feb. 1 & Feb. 2 & Alternative Motion f/Stay, filed. M/D 3/6/90 EOD 3/2/90 br
2/14/90	47	Pltf's MOTION FOR TRIAL by Jury, filed. M/D 3/6/90 EOD 3/2/90 br
4-2-90	48	Bill of Cost of Deft. Merrill Lynch, Pierce, Fenner, Smith, Inc. And Memorandum In Support Thereof And Affidavit of Karl S. Stern, filed. eod 4-9-90 hs
8/6/90	49	(SL) ORDER, entered. Parties notified. Pltf's mtn to alter and amend Court's orders of 2/1 and 2/2 and alt mtn for stay (# 46) and pltf's mtn for trial by jury (#47) are DENIED. cj
8-13-90	50	Pltf's NOTICE OF CONSOLIDATED APPEAL from the Orders entered on 2-1-90, 2-2-90 and 8-6-90, filed. (fees not paid) km

8-20-90	Mailed notice Of filing appeal to all parties and CCA. km
8/24/90	Filing and docketing fees PAID #354299, $105.00. Parties notified. jd
10-16-90	RECORD ON APPEAL consisting of all original instruments forwarded to the CCA. (2 volumes of record and 1 volume of transcript) km

Date of Entry: October 5, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. G. DILLARD,	$	
	$	
Plaintiff	$	CIVIL ACTION
	$	NUMBER H 85-4135
v.	$	
MERRILL, LYNCH, PIERCE,	$	
FENNER & SMITH, INC.,	$	
	$	
Defendant	$	

COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now C. G. Dillard, Plaintiff herein complaining of Merrill, Lynch, Pierce, Fenner & Smith, Inc., Defendant herein, and for cause of action, Plaintiff would show the Court as follows:

1. Plaintiff, C. G. Dillard, a small investor and speculator, a consumer of services provided by the defendant in Houston, Harris County, Texas.

2. Defendant Merrill, Lynch, Pierce, Fenner & Smith, Inc., is corporation organized under the laws of another state which does business in Houston,

Harris County, Texas as well as other locations and it may be served with process by way of its Resident Vice-President, Steven A. McAnally, at its offices at 12 Greenway Plaza, #200 Houston, Texas 77046.

Jurisdiction and Venue

3. This Court has subject matter jurisdiction pursuant to 28 U.S.C. #1332 (A) (1) because it is a civil action between citizens of different states where the-amount in controversy exceeds the sum of $10,000, exclusive of interest and costs.

4. Venue is proper in this District pursuant to 28 U.S.C. #1391 (A) because the claim arose here.

Facts

5. Plaintiff has for several years maintained an account with Defendant for the purpose of trading in stocks, options, bonds and other securities at

Defendant's offices at Greenway Plaza, Harris County, Texas. (location at which untrue statement of material fact was made).

6. Plaintiff had, at considerable expense, acquired the right to purchase 52,000 shares of Superior Oil Company ("SOC") at $35 per share. These option contracts were exercised by Plaintiff on December 15,1983.

7. Plaintiff requested that the terms of his payment for the SOC shares be changed from payment due date of December 23,1983 to payment due date of December 29,1983. (the date fraud was proven to Plaintiff).

8. On December 23, 1983 (date of untrue statement of material fact), Plaintiff was told by Steven A. McAnally, representing Defendant, that payment on December 29, 1983 had been approved by the Self Regulatory Agency of the Exchange and by the Federal Securities and Exchange Commission and

that Defendant would also agree to December 29,1983 payment date, but only if Plaintiff purchased Guaranty Insurance from Defendant.

9. Defendant told Plaintiff that insurance was necessary to eliminate the hazard of economic loss to Defendant should the value of the stock decrease below what was owed and the Plaintiff fail to pay on December 29; if Plaintiff would agree to purchase from or through Defendant about $104,000 worth of puts which gave the holder the right to sell 52,000 shares of SOC at $35 per share; Defendant could suffer no loss as a result of the granting of the extension of payment and would, therefore, certainly deliver to Plaintiff exactly 52,000 shares of SOC on December 29, 1983 (untrue statement of material fact).

10. It was agreed by Plaintiff and

Defendant and Defendant did purchase for the account of Plaintiff 520 SOC March 17, 1984 expiration $35 puts as insurance to guarantee and warranty their mutual contract for payment for and delivery of the 52,000 SOC shares.

11. Defendant promised to hold both puts and stock in trust in Plaintiff's account until December 29, 1983. On December 27, 1983, Defendant told Plaintiff that it was taking some of the 52,000 shares of SOC from Plaintiffs account and was selling them for the purpose of settling and unrelated transaction.

12. Plaintiff pointed out to Defendant that equity in Plaintiff's accounts was sufficient so that no liquidation was necessary to reasonably protect Defendant from loss; and Plaintiff cited to Defendant terms of contract and explained damages that would certainly result if all 52,000 shares of stock were not

delivered to Plaintiff on December 29, 1983. Plaintiff's objections were ignored and Defendant sold some of the stock.

13. Plaintiff hand delivered a letter to Defendant prior to the opening of the market on December 28 and watched Steven D. McAnally read the letter. The letter protested the wanton and capricious damage done by the partial sale of the previous day and the letter demanded that no additional SOC shares be sold.

14. Defendant continued to sell more of Plaintiff's SOC shares after the market opened on December 28, exhibiting reckless, highly unreasonable conduct and a carelessness approaching indifference.

15. Although Plaintiff's SOC stock was only partially liquidated, Defendant's actions prevented the on-time delivery and the beneficial use

of the 52,000 shares of SOC which had been guaranteed by Defendant to Plaintiff. Loss to Plaintiff was caused by Plaintiff's reliance on deception by Defendant and Plaintiff's reliance was justified due to previous history of much more thinly margined trades. Plaintiff had arranged by previous written contract with a third party the sale of the 52,000 shares of SOC. In order to execute the contract, it was imperative that all 52,000 shares be available on the mutually agreed date: December 29, 1983. As a direct result of Defendant's unconscionable actions, fraudulent representations, intentional misconduct, material misstatements and gross negligence, Plaintiff was unable to complete the sale of the stock on December 29, 1983 as per the terms of the third party contract.

16. Sale under the terms of the third party contract specified revenues to Plaintiff of at least $250,000 more than Defendant credited to Plaintiff's account as a result of Defendant's liquidations of the SOC stock. In addition to the aforementioned $250,000 loss, Plaintiff lost in excess of another $250,000 in direct losses because of purchases of Superior Oil Company stock and Superior Oil Company stock options from or through Defendant (losses total over $500,000).

17. Defendant did illegally, unilaterally, award itself over $6,500 in extra commissions out of Plaintiff's account. Under captive customer conditions Defendant did grant itself commission increases out of Plaintiff's funds, which had been entrusted to Defendant's care, in an eleventh hour attempt to loot Plaintiff's account before it passed

from Defendant's control. After receipt of copy of letter from Plaintiff to Steven D. McAnally dated December 28, 1983 (the second letter to Defendant from Plaintiff of that date) Thomas W. Taylor, Vice President of Merrill Lynch, Pierce, Fenner and Smith, Inc. did confer with Plaintiff on December 28 by telephone; Thomas W. Taylor did then apologize profusely for the commission increase because he had negotiated the long standing contract with Plaintiff and he had recently reconfirmed the commission structure when Plaintiff had told Thomas W. Taylor that Plaintiff was considering changing brokerage houses. Thomas W. Taylor then said to Plaintiff that he was helpless to prevent or rescind the increase in commissions; although he then confirmed the legal contract rate as well as the illegal overcharges.

18. In order to facilitate the fraud Defendant did use instruments of transportation and communication in interstate commerce including the mails.

Causes of Action

19. Violation of Section 17(A) (1) (2) and (3) of The Securities Act of 1933.

20. Violation of Section 10 (B) of The Securities Exchange Act of 1934.

21. Violations of law stipulated in 15 U.S. C.S. Section 78 J (B) and under S. E. C. Rule 10 B-5. Plaintiff wishes to join state law violation with Rule 10 B-5 claim: State law remedies are available and facts shown make out prima facie case for state relief under the provisions of Texas Business and Commercial Code, Section 17.41 et seq. The acts and practices of Defendant as herein described are prohibited by this statue: The Texas Deceptive Trade Practices - Consumer

Protection Act ("D.T.P.A.").

A. Plaintiff resides in Harris County, Texas, and is a "consumer" as that term is defined in Section 17.45 (4) of the D.T.P.A.

B. Defendant does business in Harris County, Texas, and sold services to Plaintiff in Harris County, Texas, which services are covered by the D.T.P.A. Defendant sold a service and a thing of value; their warranty was commodity, a thing of value. Insurance is a "Service" under the provisions of D.T.P.A. The Guaranty Insurance which the Defendant provided against any breach of the contract for delivery to Plaintiff of the 52,000 SOC shares was to protect an insurable interest for which Plaintiff paid valuable consideration in commissions to the Defendant as

well as the costs of the puts themselves.

C. The puts were not used for their agreed upon purpose which was to insure a December 29 delivery of exactly 52,000 SOC shares.

D. Defendant's unconscionable course or action resulted in a gross disparity between value received and consideration paid in a transaction involving transfer of consideration. Under D.T.P.A., such unconscionable action is a specific violation of the act.

E. Defendant also violated other sections of the D.T.P.A.:

17.46 B (2) Defendant caused confusion as to sponsorship

17.46 B (5) Defendant indicated approval uses and benefits that his service did not have

17.46 B (12) Defendant represented that agreement conferred rights,

remedies or obligations which it does not have or which are prohibited by law.

17.46 B (14) Defendant misrepresented the authority of a salesman, representative or agent to negotiate the final terms of a transaction.

17.46 B (23) Defendant failed to disclose information concerning goods or services which were known at the time of transaction and such failure to disclose was intended to induce the Plaintiff into a transaction the Plaintiff would not have entered had the information been disclosed.

22. The unlawful acts and practices of Defendant described herein were unconscionable, manipulative, deceptive and indicate a failure to act reasonably. Defendant's illegal actions were performed knowingly, adversely affected Plaintiff and were a

producing cause of damages to Plaintiff and Plaintiff seeks to recover the amount of money which, if paid in cash, would fairly and reasonably compensate Plaintiff for such damages. Plaintiff's damages include amounts of not less than $256,500, all of which is actual out of pocket cost to Plaintiff not counting any interest from time of loss or costs of litigation or any punitive or exemplary damages.

23. WHEREFORE, Plaintiff, C. G. Dillard, respectfully requests that the Honorable Judge of this Court declare that Defendant, Merrill, Lynch, Pierce, Fenner & Smith, Inc., must pay judgment in the amount of $256,500, plus prejudgment and postjudgment interest as provided by law, plus reasonable attorney's fees pursuant to Article 2226 of the Texas Revised Civil Statutes, for cost of

court and for such other further relief as Plaintiff may show himself to be justly entitled including: Pursuant to Section 17.50 B (1) of the Texas Deceptive Trade Practices - Consumer Protection Act, Plaintiff is entitled, as a matter of law, to obtain from defendant three times the amount of Plaintiff's damages as herein described.

Respectfully submitted,

C. G. DILLARD, PLAINTIFF
120 Tuam Street
Houston, Texas 77006
(713) 520-6807

Date of Entry: March 23, 1987

COURTROOM MINUTES

(RNS) MOTION CONFERENCE
Date: March 23, 1987

C.A. No. H-85-4135

Court Reporter: Joyce Schaefer
Law Clerk: Bob Davee
Time: 4:30 / 5:30

Appearances:
Pltf(s) = C. J. Dillard, pro se

Deft(s) = Karl Stern

DOCKET ENTRY: Pltf's motion for leave to amend GRANTED.

Pltf's First Amended Complaint is considered filed.

Pltf's motion for default DENIED.

Pltf's Sec. 17a claims dismissed.

Pltf has not adequately pled R.10b5. Case stayed pending arbitration.

Deft to submit copy of the order.

Date of Entry: April 11, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. G. DILLARD	$	
	$	
PLAINTIFF	$	
	$	
v.	$	CIVIL ACTION NO: H-85-4135
	$	
MERRILL, LYNCH,	$	
PIERCE, FENNER &	$	
SMITH, INC.	$	
	$	
DEFENDANT	$	

MINUTE ENTRY

This case is to be transferred to the docket of United States Magistrate George A. Kelt, Jr. A status conference will be set at a later date.

DONE at Houston, Texas this 11th day of April, 1988.

KAREN K. BROWN
UNITED STATES MAGISTRATE

Date of Entry: September 8, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DILLARD	$	
	$	
VS.	$	CIVIL ACTION
	$	NO. H-85-4135
MERRILL LYNCH,	$	
PIERCE, FENNER AND	$	
SMITH, INC.	$	

ORDER

Pending before the Court in the above referenced cause is Plaintiff's petition to the Chief Judge, which the Court construes to be a motion to consolidate this action with two others, H-86-3251 and H-88-2848. This motion should properly be directed to the judge to whom the lowest numbered case is assigned, in the instant action to the Honorable G. A. Kelt, Jr.

DONE in Houston, Texas, this 8th day of September, 1988.

JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

Date of Entry: December 19, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. G. DILLARD,	$	
	$	
Plaintiff	$	
	$	
v.	$	C.A. H-85-4135
MERRILL, LYNCH,	$	
PIERCE,	$	
FENNER & SMITH, INC.,	$	
	$	
Defendant	$	O R D E R

Plaintiff's motion to consolidate this action with C.A. H-86-3251 and C.A. H-88-2848 filed on August 22, 1988, is DENIED. The cases do not present common questions of fact and of law.

The Clerk shall enter this Order and provide a copy to all parties.

DONE at Houston, Texas, on this the 13th day of December, 1988.

GEORGE A. KELT, JR.
United State Magistrate

Date of Entry: August 9, 1989

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2690
USDC #CA-H-85-4135

C.G. DILLARD,

Plaintiff-Appellant,

versus

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.,

Defendant-Appellee.

Appeal from the
United States District Court
for the Southern District of Texas

Before JOLLY, JONES, and DUHE, Circuit Judges.

BY THE COURT:

This Court must examine the basis of its jurisdiction on its own motion if necessary. Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987). Upon examining the district court's docket sheet in this securities action, we can discern no basis for appellate jurisdiction.

In this case, the plaintiff has filed a notice of appeal from an order of the district court staying the action pending arbitration. In an addendum to the notice of appeal, plaintiff requests permission to appeal pursuant to 28 U.S.C. $ 1292(b) and further states that he is, pursuant to 28 U.S.C. $ 1292(a), appealing the district court's refusal to grant injunctive relief.

Orders staying actions pending arbitration are not appealable prior to entry of final judgment unless certified for appeal pursuant to 28 U.S.C. $ 1292(b) or unless review is sought by a petition for writ of mandamus. See: Turboff v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 867 F.2d 1518, 1520 n.5 (5th Cir. 1989). In the present case, no final judgment has been entered and, although the plaintiff has requested permission to take an interlocutory appeal, he has failed to obtain certification from the district court as required by $ 1292(b). Moreover,

as to the matter of injunctive relief, no appeal is available because the district court has not ruled on the request for such.

APPEAL DISMISSED.

Plaintiff's requests for removal of the stay and for injunctive relief, brought presumably pursuant to Fed. R. App. P. 8, are DENIED as moot.

Date of Entry: September 6, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. G. DILLARD,	$	
	$	
Plaintiff,	$	
	$	
v.	$	CIVIL ACTION
	$	NO. H-85-4135
MERRILL LYNCH, PIERCE,	$	
FENNER & SMITH, INC.,	$	
	$	
Defendant.	$	

ORDER

On March 23, 1987, this action was stayed pending arbitration. The parties are to file within 30 days from the entry of this Order, with a copy to Chambers (Room 9535), an agreed statement describing the status of the arbitration, and in particular, when it will be concluded.

SIGNED at Houston, Texas, this 1st day of September, 1989.

SIM LAKE
UNITED STATES DISTRICT JUDGE

Date of Entry: October 26, 1989

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2690
USDC #CA-H-85-4135

C.G. DILLARD,

Plaintiff-Appellant,

versus

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.,

Defendant-Appellee

Appeal from the
United States District Court
for the Southern District of Texas

Before JOLLY, JONES, and DUHE, Circuit Judges.

BY THE COURT:

Construing plaintiff's request for rehearing and to suspend the rules as a petition for rehearing pursuant to Fed. R. App. P. 40, the petition for rehearing is DENIED.

Moreover, plaintiff's request that we treat his notice of appeal in this action as a petition for writ of mandamus is DENIED for lack of compliance with Fed. R. App. P. 21 and Fifth Circuit Loc. R. 21.

Date of Entry: February 1, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. G. DILLARD,	$	
	$	
Plaintiff,	$	
	$	
v.	$	CIVIL ACTION
	$	NO. H-85-4135
MERRILL LYNCH, PIERCE,	$	
FENNER & SMITH, INC.,	$	
	$	
Defendant.	$	

ORDER

This action was stayed pending arbitration in accordance with the Court's Order of September 6, 1989. Before the Court are the plaintiff's "Response to the Court's Order of September 6, 1989," (#42) and plaintiff's "Motion for Findings of Fact and Conclusions of Law Concerning Injunctive Relief and Other Previously Filed Motions" (#29) to refuse to submit to arbitration.

C. G. Dillard, plaintiff, filed his Complaint (#1) against defendant Merrill Lynch, Pierce, Fenner & Smith, Inc.

("Merrill Lynch") on July 16, 1985. He alleges diversity jurisdiction, although he doesn't specify where Merrill Lynch is incorporated or where its principal place of business is located.

Plaintiff alleges that Merrill Lynch committed certain fraudulent acts in handling securities transactions on his behalf. In particular, plaintiff claims that he was required by Merrill Lynch to purchase Superior Oil Company (SOC) put options as a "Guarantee Insurance" in order to receive 52,000 shares of SOC on December 29, 1983, at which time he would pay for the shares. Plaintiff alleges that Merrill Lynch partially liquidated his SOC options on December 27 and 28, 1983, over the express objections of the plaintiff. Plaintiff claims that this sale caused him $250,000 in lost revenues because it prevented the completion of a previous contract to sell 52,000 shares of SOC to a third party. Plaintiff claims that his loss

was a direct result of defendant's "unconscionable actions, fraudulent misrepresentations, intentional misconduct, material misstatements and gross negligence." (Complaint at p. 5). Plaintiff also claims that he had to pay $6,500 in commissions that were illegal that Merrill Lynch unilaterally awarded itself.

Plaintiff alleges in his Complaint that these actions were in violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 71j(b) and rule 10B-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, and the Texas Deceptive Trade Practices Act, TEX. BUS. & COM. CODE § 17.41 et. seq., and § 17(a) of the Securities Act of 1933, 15 U.S.C. § 771(2). (Section 17(a) of the 1933 Act was substituted for § 12(2) in plaintiff's First Amended Complaint (#9) because the statute of limitations had expired on § 12(2).) Plaintiff later filed several motions requesting a default judgment against the defendant when defendant never

filed an answer. In lieu of filing an answer defendant filed a Motion to Dismiss Plaintiff's Complaint, or in the Alternative, for a More Definite Statement (#3) on August 16, 1985. Defendant claimed that plaintiff had not complied with Fed. R. Civ. P. 9(b), which requires the circumstances constituting a fraud to be stated with particularity. Defendant also asserted that plaintiff's claim under $ 12(2) of the 1933 Act was not commenced within the required period of limitation.

On March 23, 1987, the late Judge Ross Sterling held a motion conference at which he ruled on the parties' motions, including defendant's Motion for Stay Pending Arbitration and Motion to Compel Arbitration (#5). Judge Sterling granted Plaintiff's Motion for Leave to Amend, but dismissed plaintiff's claims under $ 17(a) of the 1933 Act because there is no private right of action under $ 17(a). He also held that plaintiff had not adequately pled his

fraud allegations to maintain a $ 10B-5 claim. Plaintiff's Motion for Judgment by Default (#21) was denied because defendant had filed the Motion to Dismiss. Judge Sterling then stayed the case pending arbitration, holding any remaining claims to be arbitrable. (Although Judge Sterling died without memorializing his rulings in an order, they are reflected in the hearing transcript, Docket Entry #25.) This Court concurs with Judge Sterling's finding of a contract requiring arbitration. No claim has been made in plaintiff's Complaint or First Amended Complaint that creates any question of law, equity or fact that cannot be arbitrated. Plaintiff's motions objecting to arbitration on the grounds of federal anti-trust law or adhesion contracts are irrelevant because they are beyond the scope of his pleadings. After careful consideration, plaintiff's "Response to the Court's Order of September 6, 1989," and "Motion for Findings of Fact and Conclusions of Law Concerning

Injunctive Relief and Other Previously Filed Motions" are DENIED.

The parties are ORDERED to begin arbitration within 30 days of the entry of this Order, and this action is DISMISSED without prejudice.

SIGNED at Houston, Texas, this 29th day of January, 1990.

SIM LAKE
UNITED STATES DISTRICT JUDGE

Date of Entry: February 2, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. G. DILLARD,	$	
	$	
Plaintiff,	$	
	$	
v.	$	CIVIL ACTION
	$	NO. H-85-4135
MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,	$	
	$	
	$	
Defendant.	$	

FINAL JUDGMENT

Pursuant to the Court's Order of today, this action is DISMISSED with costs taxed against the plaintiff.

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, this 29th day of January, 1990.

SIM LAKE
UNITED STATES DISTRICT JUDGE

Date of Entry: August 6, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. G. DILLARD,	$	
	$	
Plaintiff,	$	
	$	
v.	$	CIVIL ACTION
	$	NO. H-85-4135
MERRILL LYNCH, PIERCE,	$	
FENNER & SMITH, INC.,	$	
	$	
Defendant.	$	

ORDER

Plaintiff's Rule 59 Motion to Alter and Amend the Court's Orders of February 1 and February 2 and Alternative Motion for Stay (Docket Entry No. 46) and Plaintiff's Motion for Trial by Jury (Docket Entry No. 47) are DENIED.

SIGNED at Houston, Texas, this 3rd day of August, 1990.

SIM LAKE
UNITED STATES DISTRICT JUDGE

Date of Entry: September 11, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C . G . DILLARD,	$	
	$	
Plaintiff,	$	
v.	$	NO. H-85-4135
MERRILL LYNCH, PIERCE,	$	
FENNER, SMITH, INC.,	$	
	$	
Defendant.	$	

PLAINTIFF'S MOTION TO DECLARE COMPULSORY ARBITRATION PROVISIONS OF DEFENDANT'S ADHESION CONTRACTS TO BE INVALID, AND UNENFORCEABLE AND TO ENJOIN ENFORCEMENT OF SAME

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW C. G. Dillard, Plaintiff in the above referenced action and files this Motion to Declare the Compulsory Arbitration Provisions of Defendant's Adhesion Contracts to be Invalid and Unenforceable because of grounds that exist in law and in equity and in that regard would respectfully show the Court the following:

1. The contracts in question are adhesion contracts: it is a standard form offered to plaintiff on a "Take it or Leave it" basis without affording realistic opportunity to bargain and under such conditions that plaintiff could not obtain the desired services except by acquiescing to the form contract. Plaintiff had no choice as to its terms. Assent was not voluntary, it was coerced by the advantage of defendant which was unlawfully exercised. Unlawful advantage of defendant consisted of threat to prohibit trade of plaintiff in securities. The threat constituted duress which induced plaintiff to sign the contracts contrary to plaintiff's will and to plaintiff's detriment. Defendant's threat of restraint of plaintiff's trade overcame plaintiff's will and liberty of discretion to such an extent as to influence plaintiff to act in a way that plaintiff's judgement and discretion would condemn and prompt him not to do, if free from such influence.

2. Defendant's exploitation of unfair advantage in exempting itself from much of the consequences of its own negligence and illegal acts amounts to unfair protection of the interests of defendant in so large a manner as to interfere with the public interest. If plaintiff had been afforded the option to choose protection under the law or arbitration then the arbitration provision would be enforceable. But compelling a consumer to renounce his protection under the law upon pain of denial of services is contrary to public policy. If the desired services could be obtained from another brokerage house then defendant might argue that plaintiff did not have to trade with it and therefore the duress was not so extreme as to force compliance. But brokerage house services currently are, and at the time of contract were, unavailable to any consumer unless that consumer signs a virtually identical compulsory arbitration provision.

3. There is a de facto conspiracy of brokerage houses to deprive buyers and sellers of securities of rights to due process and protection of law in securities transactions by restraint of trade and commerce in purchase and sale of securities. Every major brokerage house has conformed to a uniform pattern of conduct in compelling the execution of a contract containing a compulsory arbitration provision (plaintiff challenges defendant to name a single major brokerage house that does not). Plaintiff was unable to find any brokerage house large or small that does not impose upon its customers a contract stipulating compulsory arbitration as a precondition to doing any business. Therefore choice even at another brokerage house was impossible.

4. Agreement, combination or conspiracy may be inferred from course of dealings warranting conclusion that conspirators had common design, meeting of minds or acted in concert and uniform

participation by competitors in a particular system of doing business where each is aware of the other's activities, the effect of which is restraint of interstate commerce is sufficient to establish unlawful conspiracy under the Sherman Act (15 USCA $$ 1-7, 15). Plaintiff submits to the Court that defendant's actions are a violation of the Sherman Act in the manner just described. Please see: William Goldman Theaters, Inc. v. Loew's, Inc. (1945, Ca. 3 Pa.) 150 F2d 738.

5. The United States brought suit in the District Court of the United States for the Southern District of New York, attacking the contract in question or a similar one on the ground that it was in violation of the Sherman Anti-Trust Act (15 USCA $$ 1-7, 15). In an able opinion, Judge Thacher of that court held the arbitration clause of the contract to be unlawful as being in violation of the

Sherman Anti-Trust Act [United States v. Paramount Famous Lasky Corporation, 34 F. (2d) 984], and entered a decree enjoining the Paramount Famous Lasky Corporation, from acting under the arbitration clause in the contract. The opinion and decree of the District Court was affirmed by the Supreme Court of the United States (Paramount Famous Lasky Corporation v. U.S., 282 U.S. 30, 51 S. Ct. 42, 75 L. Ed.

6. District Judge Thacher adjudged that:

"Trade or commercial groups or traders generally may voluntarily impose on themselves standard forms of agreement which do not unduly restrict competition and thus restrain trade, and may agree that all controversies should be settled by arbitration so long as such agreements are not sought to be imposed on others, regardless of their wishes, by coercive combinations having power to enforce their will.

In Equity. Suit by the United States against the Paramount Famous Lasky

Corporation and others to restrain conspiracy in restraint of trade. Decree for complainant.

In Equity. Suit by the United States under section 4 of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209 [15 USCA$4]) to enjoin the defendants from further engaging in a conspiracy in restraint of interstate trade and commerce, in violation of the section 1 of said Act. (15 USCA $ 1).

The conspiracy charged in this case is predicated upon acts of the defendants in adopting and agreeing to use, and in using exclusively, certain uniform contracts for the lease of motion picture films to theater owners throughout the United States, containing provisions for the determination by arbitration of all claims and controversies arising under said contracts.

...it had been the consistent policy of the distributors to refuse to deal with

exhibitors who failed to arbitrate....The coercive effect of this situation has undoubtedly been that, unless exhibitors submitted to arbitration...they have been unable to enter into new contracts.

...One can hardly imagine a more direct restraint upon trade than an agreement between competitors in an open market not to trade except upon terms which they have fixed in advance.

...In judging the inherent character of the restraint one must look not only to the restraint voluntarily imposed upon the competitive activities of those who are in the combination, but also to the involuntary restraint imposed upon the freedom of outsiders to engage in trade under natural and normal conditions. It is therefore not enough to say that competition between distributors is keen and active, or even that it has been promoted and enhanced by what has been done, if, in fact, it can be seen that the freedom of others to engage in trade, to

enter into normal commercial agreements, and to have recourse to the courts for their rights, has been unduly restrained by the coercive and collective action of the defendants. That competition between the distributors has been promoted by the adoption of the standard exhibition contract, and that in many ways general trade conditions have been vastly improved, I have no doubt and so find. But the record is equally clear that all this good has been accomplished through the exercise of irresistible economic force consolidated by combination in the hands of the distributors, who collectively control the available supply of films and by virtue of this control have imposed their will upon the industry. By agreement of these distributors exhibitors who were not represented in the adoption of the uniform contracts have been constrained to accept their terms regardless of their wishes, and by the compulsory system of arbitration,

sanctioned and enforced by the collective action of the distributors, have been constrained to perform the contractual obligations thus assumed. In fairness it cannot be said that the restraint imposed upon these exhibitors is voluntary because they accept and agree to be bound by the contracts. They can have none other, because the defendants have agreed that they shall not; and, unless something more than the mere acceptance of all they can get is shown, they must be said to have acted under an involuntary restraint, imposed and continued by the defendants to the end that the contracts shall be signed and their terms obeyed. That such coercive restraint upon the commercial freedom of an exhibitor, who was neither represented nor consulted with reference to the agreement to adopt the standard form of contract, is undue and unreasonable, both at common law and under the Sherman Act. I cannot doubt. Gains resulting from such restraints to the industry as a whole do not in the eyes of

the statute justify the vicarious sacrifice of the individual, even for the sake of bigger and better business. A state Legislature could not lawfully impose compulsory arbitration upon the motion picture industry. Wolff Packing Co. v. Court of Industrial Relations of State of Kansas, 262 U.S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280. Much less should it be within the power of a combination of practically all the distributors to do so by coercion exercised through control of the available supply of films.

...the restraint, if not shown to have been voluntary on both sides, is oppressive, and therefore undue and unreasonable.

...Nothing that has been said should be taken in derogation of the right of trade or commercial groups, or of traders generally, to voluntarily impose upon themselves standard forms of agreement

which do not unduly restrict competition and thus restrain trade, or to agree that all controversies arising between them shall be settled by arbitration. Such agreements dealing only with the rights of those who execute and intend to be bound by them are normal and usual, and are proper instruments in the lawful conduct of trade. It is only when such agreements are sought to be imposed upon others, regardless of their wishes, by coercive combinations having the power to say 'Take what is offered or get nothing,' that they become illegal."

7. H-85-4135 is indistinguishable from the Paramount Case in all essential elements concerning the arbitration clause.

8. Defendant's alleged right to force arbitration on all its customers whether they like it or not is in conflict with the Fourteenth Amendment to the United States Constitution, and deprives plaintiff of his property and liberty of contract without due process of law. For this and the other

reasons aforementioned plaintiff respectfully submits that defendant should be enjoined from acting under the arbitration clause.

WHEREFORE, Plaintiff C. G. Dillard prays that this Court enjoin defendant from attempt to enforce compulsory arbitration under the terms of the arbitration clauses in the adhesion contracts, which contracts have been previously submitted to the Court as Defendant's Exhibits I, II, III and IV.

Respectfully Submitted,

C. G. Dillard
120 Tuam St.
Houston, Texas 77006
(713) 520-6807

Date of Entry: February 14, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. G. Dillard	$	
Plaintiff	$	
	$	
v.	$	No. H-85-4135
	$	
MERRILL LYNCH, PIERCE	$	
FENNER & SMITH, INC.,	$	
Defendant	$	

MOTION FOR TRIAL BY JURY

Comes now, C.G. Dillard, Plaintiff herein and I do tell the court that request for jury trial has previously been made and I am filing this separate motion for same in order that there be no mistake and so that the jury request is abundantly apparent rather than buried in the pleadings where it might be missed.

It is therefore confirmed that I do request that this action be decided by jury under the provisions of the Seventh Amendment to the Constitution of the United

States of America.

Respectfully Submitted,

C. G. Dillard
118 Hoffman Way
Grants Pass, OR 97526
(503) 474-1565

Date of Entry: April 10, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. G. Dillard	$	
Plaintiff	$	
	$	
v.	$	No. H-85-4135
	$	
MERRILL LYNCH, PIERCE	$	
FENNER & SMITH, INC.,	$	
Defendant	$	

PLAINTIFF's MOTION FOR TRIAL BY JURY
RESTRICTED TO SPECIFIC ISSUE
OF THE ARBITRATION AGREEMENT

Comes now C.G. Dillard, plaintiff in the above referenced action, and files this Motion For Trial By Jury Restricted To Specific Issue Of The Arbitration Agreement. In support of this motion C.G. Dillard would respectfully show as follows: Plaintiff has repeatedly and unequivocally stated in his other pleadings in this case that there is no arbitration agreement between plaintiff and defendant. Plaintiff's signatures on the documents which defendant represents as being agreements to arbitrate were obtained by duress. No arbitration agreement exists

between plaintiff and defendant. Plaintiff can not be ordered into compulsory arbitration under the terms of a non-existent agreement. Prior to the court issuing any order to arbitrate there must be a finding of fact and law regarding the disputed agreement and said findings must be recorded in the record.

Questions as to validity of arbitration agreement is substantive question governed by federal rather than local law. Please see 9 U.S.C.A. Section 2; U.S.C.A. Const. Art. 1, Section 8, CL. 3; Art. 3, Section 2, CL. 1. it is clear that there must be judicial trial of the Federal Anti-Trust Law violations, Common Law and State Law violations and U.S. Constitution, Fourteenth Amendment violation. Said determinations must be made by jury before stay can issue pending arbitration. Please See: Robert Lawrence Co. v. Devonshire Fabrics, Inc. (1959, CA2 NY) 271 F2d 402, cert gr 362 US 909, 4 L ed

2d 618, 80 S. Ct. 682, cert dismd 364 US 801, 5 L ed 2d 37, 81 S Ct 27.

The Lawrence case shows that a violation of any law or condition precedent to fair bargain and binding contract in the making of the agreement to arbitrate voids the arbitration agreement and that a separate trial should be held in Federal Court to determine if law was violated in the making of the agreement to arbitrate voiding said agreement.

Under the provisions of 9 U.S.C.A. Section 2 the arbitration clause in the instant case is null and void because it's execution was induced by illegal compulsion by monopoly and restraint of trade in violation of substantive Federal Anti-Trust Law including provisions of the Clayton Act 15 U.S.C.S. Sections 12 et. seq. and the Sherman Act 15 U.S.C.S. Section 1 et. seq. also gross disparity in bargaining position, unequal bargain, use of duress, and use of coercion are evidenced in the circumstances surrounding the making of the

alleged agreement to arbitrate between plaintiff and defendant. The arbitration agreement is void because it is against public policy. Plaintiff hereby demands that defendant answer plaintiff's complaint that the arbitration clause is not valid nor enforceable. In order to demonstrate substance to the charge of invalid arbitration clause so that this issue can be promptly scheduled for trial plaintiff will show the court:

Under the provisions of Section 4 of the Clayton Act:

1. Plaintiff is a person within the meaning of the statute.

2. Plaintiff has alleged and can by the facts obviously establish that a violation of the Anti-Trust Laws has in fact occurred. See pleading.

3. The Anti-Trust Law violated is one within the meaning of Section 4, the Sherman Act.

4. There is injury to plaintiff's business

and to his property because illegal contract unreasonably restrained plaintiff from engaging in business of securities trading lest he sacrifice right of recovery by judicial determination of monies stolen by defendant. Property stolen by defendant from plaintiff is actually diminished in value as a result of the anti-trust violation because on the average only one half of monies illegally taken from it's customers are returned as a result of arbitration. Recourse under the law, will result in full recovery of defendant's property with appropriate damages in order to properly and legally compensate defendant for the illegal deprivation and theft. Under the law plaintiff will probably collect over one million dollars from defendant. But under arbitration, because of anti-trust law violation, the amount plaintiff would probably collect from defendant is only about one hundred fifty thousand dollars.

5. The direct result of defendants' Sherman Act violations is to deprive defendant of substantial monies currently due from defendant to plaintiff.

6. The certain result of defendants' wrongful behavior is to line it's own pockets with plaintiff's money, which money if not for the anti-trust law violation would be judicially commanded be paid to plaintiff. The anti-trust violation was done willfully and deliberately by defendant in order to prevent just recovery under the law of amounts it might steal. Under Section 1 of the Sherman Act combination and conspiracy with it's competitors in unreasonable restraint of trade is charged against defendant.

Under Section 2 of the Sherman Act monopolization of the securities brokerage business and conspiracy to monopolize is charged against defendant.

Plaintiff additionally charges conspiracy by defendant and its competitors in violation of the Sherman Anti-Trust Act

by defendant in it's adopting and agreeing to use, and in using exclusively certain uniform contracts for securities trading containing provisions for the determination by arbitration of all claims and controversies arising under said contracts.

A plurality, indeed almost every brokerage company has taken concerted action by consensus or agreement to act together with it's competitors to unreasonably restrain the trade of any who do not renounce their rights under the law and agree instead to arbitrate in an unfair forum set up by defendant and it's co-conspirators which is rife with conflict of interest. The disputed trades took place in a margin account and therefore proof of monopolization can be made by the total lack of opportunity to do anything but arbitrate disputes arising in each and every other of defendant's competitor's customer's margin accounts. To the best of plaintiff's knowledge and belief

monopolization in the aforementioned regard is 100%; all evidence to the contrary is statistically insignificant and by design generally unknown and unavailable to the consumer.

Plaintiff will show that the similarity of behavior can, under the facts, only be attributed to an understanding among securities industry competitors to effect the restraint; their motivation being to restrict available services to plaintiff so that he and others had no alternative but to sign unfair contract.

Defendant and it's co-conspirators in order to effect monopolization acted with the intention that services be unavailable except on similar unfair terms and legal seminars at trade associations and other exchanges of information on model arbitration clauses and their intent to use them caused each individual company to know that others would act in conjunction with it to restrain the trade of those who

refused to arbitrate. The brokerage companies contemplated the illegal action in illegal conspiracy through exchange of information and then executed the monopolization plan with full knowledge of it's probable anti-competitive effect.

The rule of reason dictates that we have here an unreasonable restraint of trade which by denial of necessary services by almost all of the providers of that service acts to deprive consumers of their property without recourse to the protection of law in violation of the Fourteenth Amendment to the United States Constitution. Indeed the arbitration clause acts as a fraudulent device by which the brokerage companies can steal and then hide their illegality in an unfair arbitration proceeding to which there is no appeal and no usable record for subsequent criminal prosecution.

The number of securities brokerage companies using the same arbitration clause

in their margin agreements is so excessive that it does in fact constitute a group boycott by concerted refusal to deal in order to coerce their customers into an unjust arbitration agreement which is illegal per se. Defendant's participation in group boycott is also illegal per se and plaintiff does specifically declare that the arbitration agreement in this case is void because of group boycott.

The adhesion arbitration agreements are invalid and unenforceable due to violations of law and equity which are grounds for the revocation of any contract.

The securities industry is acting in concert in violation of the Sherman Act; their securities brokerage monopoly acts to restrain the trade of any who refuse to arbitrate. No one can trade in securities on margin without renouncing their freedom of contract and renouncing the protection of law for their property --- rights guaranteed by the Fourteenth Amendment to the United States Constitution.

The contracts in question are adhesion contracts: it is a standard form offered to plaintiff on a "Take it or leave it" basis without affording realistic opportunity to bargain and under such conditions that plaintiff could not obtain the desired services except by signing the form contract. Plaintiff had no choice as to its terms. Assent was not voluntary, it was coerced by the advantage of defendant which was unlawfully exercised. Unlawful advantage of defendant consisted of threat to prohibit trade of plaintiff in securities. The threat constituted duress which induced plaintiff to sign the contracts contrary to plaintiff's will and to plaintiff's detriment. Defendant's threat of restraint of plaintiff's trade overcame plaintiff's will and liberty of discretion to such an extent as to influence plaintiff to act in a way that plaintiff's judgement and discretion would condemn and prompt him not to do, if free

from such influence.

Defendant's exploitation of unfair advantage in exempting itself from much of the consequences of its own negligence and illegal acts amounts to unfair protection of the interests of defendant in so large a manner as to interfere with the public interest. If plaintiff had been afforded the option to choose protection under the law or arbitration then the arbitration provision would be enforceable. But compelling a consumer to renounce his protection under the law upon pain of denial of services is contrary to public policy. If the desired services could be obtained from another brokerage house the defendant might argue that plaintiff did not have to trade with it and therefore the duress was not so extreme as to force compliance. But brokerage house services currently are, and at the time of contract were, unavailable to any consumer unless that consumer signs a virtually identical compulsory arbitration provision.

There is a conspiracy of brokerage houses to deprive buyers and sellers of securities of rights to due process and protection of law in securities transactions by restraint of trade and commerce in purchase and sale of securities. Every major brokerage house has conformed to a uniform pattern of conduct in compelling the execution of a contract containing a compulsory arbitration provision. Plaintiff was unable to find any brokerage house large or small that does not impose upon its customers a contract stipulating compulsory arbitration as a precondition to business. When asked to name any which do not require compulsory arbitration prior to opening a margin account defendant could not name even a single example of a securities brokerage company which did not. Therefore choice even at another brokerage house was impossible.

Agreement, combination or conspiracy may be demonstrated in part from course of dealings warranting conclusion that conspirators had common design, meeting of minds or acted in concert and uniform participation by competitors in a particular system of doing business where each is aware of the other's activities, the effect of which is restraint of interstate commerce is indicative of unlawful conspiracy under the Sherman Act.

The United States brought suit in the District court of the United States for the Southern District of New York, attacking an adhesion arbitration clause on the ground that it was in violation of the Sherman Anti-Trust Act. In an able opinion, Judge Thacher of that court held the arbitration clause of the contract to be unlawful as being in violation of the Sherman Anti-Trust Act, United States v. Paramount Famous Lasky Corporation, 34 F.(2d) 984, and entered a decree enjoining the Paramount Famous Lasky Corporation, from

acting under the arbitration clause in the contract. T he opinion and decree of the District Court was affirmed by the Supreme Court of the United States (Paramount Famous Lasky Corporation v. U.S., 282 U.S. 30, 51 S. Ct. 42, 75 L. Ed.

District Judge Thacher adjudged that: "Trade or commercial groups or traders generally may voluntarily impose on themselves standard forms of agreement which do not unduly restrict competition and thus restrain trade, and may agree that all controversies should be settled by arbitration so long as such agreements are not sought to be imposed on others, regardless of their wishes, by coercive combinations having power to enforce their will.

The conspiracy charged in this case is predicated upon acts of the defendants in adopting and agreeing to use, and in using exclusively, certain uniform contracts for the lease of motion picture films to

theater owners throughout the United States, containing provisions for the determination by arbitration of all claims and controversies arising under said contracts.

...It had been the consistent policy of the distributors to refuse to deal with exhibitors who failed to arbitrate.... The coercive effect of this situation has undoubtedly been that, unless exhibitors submitted to arbitration...they have been unable to enter into new contracts.

...One can hardly imagine a more direct restraint upon trade than an agreement between competitors in an open market not to trade except upon terms which they have fixed in advance.

...In judging the inherent character of the restraint one must look not only to the restraint voluntarily imposed upon the competitive activities of those who are in the combination, but also to the involuntary restraint imposed upon the freedom of outsiders to engage in trade

under natural and normal conditions. It is therefore not enough to say that competition between distributors is keen and active, or even that it has been promoted and enhanced by what has been done, if, in fact, it can be seen that the freedom of others to engage in trade, to enter into normal commercial agreements, and to have recourse to the courts for their rights has been unduly restrained by the coercive and collective action of the defendants. That competition between the distributors has been promoted by the adoption of the standard exhibition contract, and that in many ways general trade conditions have been vastly improved, I have no doubt and so find. But the record is equally clear that all this good has been accomplished through the exercise of irresistible economic force consolidated by combination in the hands of the distributors, who collectively control the available supply of films and by virtue of

this control have imposed their will upon the industry. By agreement of these distributors exhibitors who were not represented in the adoption of the uniform contracts have been constrained to accept their terms regardless of their wishes, and by the compulsory system of arbitration, sanctioned and enforced by the collective action of the distributors, have been constrained to perform the contractual obligations thus assumed. In fairness it cannot be said that the restraint imposed upon these exhibitors is voluntary because they accept and agree to be bound by the contracts. They can have none other, because the defendants have agreed that they shall not; and, unless something more than the mere acceptance of all they can get is shown, they must be said to have acted under an involuntary restraint, imposed and continued by the defendants to the end that the contracts shall be signed and their terms obeyed. That such coercive restraint upon the commercial freedom of an

exhibitor, who was neither represented nor consulted with reference to the agreement to adopt the standard form of contract, is undue and unreasonable, both at common law and under the Sherman Act, I cannot doubt. Gains resulting from such restraints to the industry as a whole do not in the eyes of the statue justify the vicarious sacrifice of the individual, even for the sake of bigger and better business. A state Legislature could not lawfully impose compulsory arbitration upon the motion picture industry. Wolff Packing Co. v. Court of Industrial Relations of State of Kansas, 262 U.S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 ALR 1280. Much less should it be within the power of a combination of practically all the distributors to do so by coercion exercised through control of the available supply of films .

...The restraint, if not shown to have been voluntary on both sides, is oppressive, and therefore undue and

unreasonable.

...Nothing that has been said should be taken in derogation of the right of trade or commercial groups, or of traders generally, to voluntarily impose upon themselves standard forms of agreement which do not unduly restrict competition and thus restrain trade, or to agree that all controversies arising between them shall be settled by arbitration. Such agreements dealing only with the rights of those who execute and intend to be bound by them are normal and usual, and are proper instruments in the lawful conduct of trade. It is only when such agreements are sought to be imposed upon others, regardless of their wishes by coercive combinations having the power to say "Take what is offered or get nothing," that they become illegal." The instant case is indistinguishable from the Paramount Case in all essential elements concerning the arbitration clause.

Defendant's alleged right to force arbitration on all its customers whether they like it or not is in conflict with the Fourteenth Amendment to the United States Constitution, and deprives plaintiff of his property and liberty of contract without due process of law.

Duress in inducement of arbitration agreement is proper ground for revocation under 9 USCS Sec. 2. See Hellenic Lines LP v. Louis Dreyfus Corp. (1967, CA 2 NY 372 F2d 753).

The coercion and duress in the instant case consisted of illegal restraint of trade in violation of the Sherman Act. A Sherman Act violation in the signing of the arbitration agreement voids that agreement. It is fact that the defendant participates in a coercive combination with its brokerage industry competitors in obvious violation of Federal Anti-Trust Law.

By design no consumer shall anywhere trade securities unless he first renounce protection of law and accept arbitration.

The consumer is by duress deprived of the right of voluntary contract making the compulsory arbitration provision no contract at all. It is more simply a unilateral declaration by the brokerage houses in concert; not a mutually agreed contract and as such it is null and void and has no force of law. Defendant's allegation of Federal Law violation is directed to the arbitration clause itself - not the contract generally. Please see: Prima Paint Corp. v. Flood and Conklin Mfg. Co. 388 U.S. 395, 406 (1967): "Accordingly, if the claim is an illegal act in the inducement of the arbitration clause itself -- an issue which goes to the 'making' of the agreement to arbitrate -- the Federal Court may proceed to adjudicate. This position is consistent both with the decision in Moseley v. Electronic Facilities, 374 U.S. 167, 171, 172 (1963) and with the statutory scheme. As the 'saving clause' in Sec. 2 indicates, the

purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so. To immunize an arbitration agreement from judicial challenge ... would be to elevate it over other forms of contract -- a situation inconsistent with the 'saving clause'") see 388 U.S. 403-404).

Federal policy suggesting that arbitration be encouraged did not give license for coercive combinations which operate in restraint of trade; nor does such a policy allow violation of Federal Anti-Trust Law in order to promote arbitration. Nor does it allow duress to be used in the making of an arbitration contract.

It has been established that claims under the Sherman Anti-Trust Act are inappropriate for arbitration. Please see American Safety Equipment Corp. v. J. P. Maguire & Co. (1968, CA2 NY) 391 F2d 821, 3 ALR FED 901.

In Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985), The Supreme Court pointed out by way of footnote that the decision expressed no view on the validity of arbitration provisions contained in adhesion contracts and that the issue was not addressed because it was not first raised in the lower courts and they thought it improper to address it in the first instance. However, the Supreme Court has previously ruled that an arbitration provision contained in a contract of adhesion is null and void if it is imposed by a participant in powerful coercive combination which acts to restrain trade of those who fail to agree to arbitrate. Until and unless The Supreme Court reverses itself on that decision it is the law. This case is in every particular exactly the same as the Paramount case (34 F2d 984 and 282 U.S. 30) as regards the agreement to arbitrate and therefore it must be treated under the law in the same manner. In order to validate its adhesion arbitration

clause, defendant must show that this case and the Paramount case are different. But it can not, for they are the same as regards the adhesion arbitration clause.

Today a film exhibitor can contract for film rental without executing an arbitration agreement. An investor should also be able to deal with a brokerage house under the protection of law. The standard that this Court should impose is that arbitration provisions of brokerage contracts may not be enforced against the party which had no choice because of restraint of trade. Rejection or acceptance of compulsory arbitration by free choice could be shown upon the contract by the initialing of appropriate box. Similarly, contracts for loans often used to include adhesion provision that insurance, often at high cost, be purchased by the borrower. Lending institutions must now allow the consumer to accept or reject this coverage, which is accomplished by the consumer

initialing his choice in an appropriate box upon the contract. The court should require that if defendant wants mandatory arbitration it must draft its contracts in such a way that the arbitration provision is not adhesion but rather is shown to be the free choice of the consumer. Once agreement to arbitrate is made, without duress, then and only then is the contract binding with the force of law and the Courts to compel arbitration as per the Byrd decision.

The Supreme Court had to assume that no duress or compulsion by monopoly was involved in the making of the agreement to arbitrate in the Byrd case because that is the way the case came to them. However, unlike the Byrd case, in this case there is allegation that the agreements to arbitrate are not valid or enforceable because of violations of Law in the making of the agreement to arbitrate.

If the securities brokerage industry is allowed to place itself above the law by

legislating by contract could not then any monopoly exempt itself from the rule of law by embracing an arbitration panel? Such a policy would be against the public interest. And therefore the arbitration contract in question in this case is void because it is against strong protective public policy concerns.

There being no private consent to support a contract of adhesion, its legitimacy rests entirely on its compliance with standards in the public interest. Defendant's adhesion arbitration clause must be declared void as a result of its imposition by monopoly in violation of Federal law as per the Supreme Court's Paramount decision. Defendant should send a contract addenda to its current customers allowing them to choose either arbitration or the law in the event of future controversy. Legally, the customer must be able to choose either, at the customer's sole option, because the voiding of the

contract provision for compulsory arbitration due to compulsion by monopoly is not available to defendant, although by the law of the Paramount case it currently is to defendant's customers which includes plaintiff in this case.

The Commodity Futures Trading Commission in 17 C.F.R. Section 180.3 voided arbitration agreements which, inter alia, are not voluntary. The record of Ames v. Merrill Lynch Pierce, Fenner & Smith Inc. 567 F2d 1174 (1977) shows why: Because the brokerage houses admitted that if a trader did not sign a compulsory arbitration agreement he was not able to trade effectively and was thus squeezed out of the commodities market. Today we have the exact same situation regarding trading securities in margin accounts: It is impossible to trade effectively in securities without a margin account and an investor can not get one anywhere unless he signs a compulsory arbitration agreement. The Court should recognize the gross

violation of law exhibited by the securities industry when they legislate by adhesion contract and the Court should prohibit enforcement of compulsory arbitration by adhesion contract.

Things will become fair and equitable in securities trading only if a man chooses to arbitrate and signs a contract to that effect because he perceives it to be to his own advantage, which free choice and perceived advantage are the essence of a contract and an unfair adhesion demand upon pain of loss of necessary services is no contract and is contrary to the principles upon which this great nation was founded. And should the Court allow it in this instance what then prevents other coercive combinations from setting up their own arbitration panels and by irresistible economic force and adhesion contract then exempting themselves from the rule of law?

Plaintiff conferred by telephone with counsel for defendant on April 10, 1987 and

we were unable to reach an agreement upon the disposition of the matters raised by this motion.

The submission date of this motion is Monday April 20, 1987.

WHEREFORE, plaintiff C. G. Dillard does respectfully submit to the Court that it should order that jury trial be had in order to settle the issues raised concerning the validity and enforceability of the alleged agreement to arbitrate between plaintiff and defendant. Specific findings of the jury should be such that they will conclusively determine if there is such an agreement or if the alleged agreement is rendered null and void because of findings of fact which show:

Common Law violations

State Law violations

Federal Law violations

U.S. Constitutional Law violations

Date of Entry: April 20, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. G. DILLARD,	$	
Plaintiff,	$	
	$	
v.	$	No. H-85-4135
	$	
MERRILL LYNCH, PIERCE,	$	
FENNER, SMITH, INC.,	$	
	$	
Defendant.	$	

ADDENDUM TO PLAINTIFF'S MOTION FOR TRIAL BY JURY RESTRICTED TO SPECIFIC ISSUE OF THE ARBITRATION AGREEMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW C. G. Dillard, plaintiff in the above referenced action and files this addendum to Plaintiff's Motion For Trial By Jury Restricted To Specific Issue Of The Arbitration Agreement, and would show the court the following:

Plaintiff does hereby name as co-conspirators with defendant in unreasonable restraint of trade, as more fully set forth in Plaintiff's Motion For Trial By Jury Restricted To Specific Issue Of The

Arbitration Agreement, Securities Industry Association, Inc.

Securities Industry Association, Inc., herein named co-conspirator and joint violator of substantive federal anti-trust law is the principal trade association of the securities industry. It has as members more than five hundred securities firms in the United States and Canada. Most of the Securities Industry Association, Inc.'s members, by mutual agreement and conscious design, use substantially identical adhesion contracts to force all margin account customers to arbitrate any controversies arising between them. Enclosed is Exhibit "A", the customer agreement form for Securities Industry Association, Inc. member, Drexel Burnham Lambert, please note section sixteen.

Plaintiff does name Securities Industry Association, Inc. as co-conspirator with defendant, Merrill Lynch, Pierce, Fenner and Smith, Inc. in violation of anti-trust laws under Sections One and

Two of the Sherman Act, Section 15 U.S.C.S.

Individual members of the Securities Industry Association, Inc., which have participated with defendant in unreasonable and illegal restraint of trade by adopting and agreeing to use and in using exclusively uniform margin account contracts for securities trading containing provisions for the determination by arbitration of all claims and controversies arising under said contracts, are charged as unnamed co-conspirators with defendant in it's Sherman Act violations and other federal law violations.

To the best of plaintiff's knowledge and belief, the number of Securities Industry Association, Inc. members who refuse to deal in order to force their margin customers into unjust arbitration agreement is 100%. This refusal to deal by all of the members who offer margin accounts of an organization that is representative of so many in the securities

industry that it's membership is in fact a securities industry monopoly constitutes an illegal group boycott and illegal group boycott by the members of the Securities Industry Association, Inc. is charged.

Plaintiff will at trial introduce evidence of the concerted illegal actions of Merrill Lynch, Pierce, Fenner and Smith, Inc., Securities Industry Association, Inc. and many of the individual members of the Securities Industry Association, Inc. as well; this pleading is meant to give notice under Rule 8 of the Federal Rules.

Defendant has ignored Plaintiff's anti-trust charges and has attempted to use unexplained, alleged, secret, defects in plaintiff's pro se pleading to provide excuse for the judge of this court to dismiss. The pleadings of plaintiff are adequate under the law for plaintiff to demand trial by jury on the arbitration issue.

WHEREFORE, PREMISES CONSIDERED, plaintiff C. G. Dillard respectfully prays that the court grant his Plaintiff's Motion For Trial By Jury Restricted To Specific Issue Of The Arbitration Agreement.

Respectfully submitted,

C. G. Dillard
118 Hoffman Way
Grants Pass, Oregon 97526
1-503-474-1565

PLAINTIFF

Date of Entry: February 11, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. G. DILLARD	$	
	$	
Plaintiff	$	
v.	$	NO. H-85-4135
	$	
MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC.	$	
	$	
Defendant	$	

MOTION FOR FINDINGS OF FACT
AND CONCLUSIONS OF LAW
CONCERNING INJUNCTIVE RELIEF
AND OTHER PREVIOUSLY FILED MOTIONS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, C. G. Dillard, Plaintiff in the above referenced action, and files this Motion for Findings of Fact and Conclusions of Law Concerning Injunctive Relief and Other Previously Filed Motions, and would show the Court the following:

Mr. Dillard talked with Karl Stern, Counsel for Defendant, on February 10, 1988 about the issues herein but was unable to reach agreement.

Judge Sterling indicated that his initial impression was to sign orders compelling arbitration and disposing of other motions and he did instruct Karl Stern, Counsel for Defendant, to draft such order and Mr. Stern did so. Mr. Dillard objected to the form of the order in that it neglected to specify findings of fact which supported the conclusions of law. Judge Sterling signed no order and no order was entered.

Mr. Dillard suggests to the Court that no order was signed because, upon reflection and review, it was evident that compulsory arbitration compelled by monopoly was unsupportable in fact and in law. Mr. Dillard prays that this Honorable Court should now enjoin enforcement of compulsory arbitration provisions of Defendant's adhesion contracts or in the alternative, this Court should order trial by jury restricted to specific issue of the arbitration agreement or in the alternative, this Court should determine

without jury that compulsory arbitration is invalid and unenforceable due to violation of the Sherman Act in the making of the agreement to arbitrate.

The death of Judge Sterling leaves all motions unresolved since no order has been entered. Mr. Dillard respectfully requests the Honorable Judge of this Court to carefully review the record and promptly issue written order granting or denying each motion by statement of conclusion of law, and Mr. Dillard requests explanation of each conclusion of law with a supporting finding of fact.

Mr. Dillard planned en banc appeal to the 5th Circuit should order be issued compelling arbitration, but appeal is improper since jurisdiction remains with the District Court in the absence of the entry of any order. The arbitration issue is of great national importance. The U. S. Supreme Court has addressed the issue of compulsion by monopoly in the making of

agreement to arbitrate in like contract in Paramount v. U. S. 282 U. S. 30 and U. S. v. Paramount 34 F 2nd 984. The Supreme Court supports Mr. Dillard's position; all rulings which support or expand the scope of compulsory arbitration under brokerage contracts have assumed that the contract was legally made because that was the way the case came to the High Court. Because the issue of illegal contract was not first raised in the Lower Courts, the High Court did not address this issue. Mr. Dillard is asking the Honorable Court to address this issue now and to issue order enjoining Defendant from continuing its illegal conduct.

Today, current news magazines lament the plight of investors who are cheated out of fair hearing by compulsion to settle disputes in an unfair forum set up by the brokerage industry. Today the Halls of Congress ring with denunciations of the abuse of the individual investor and call for more regulation of the brokerage

industry. Each passing day that the brokerage industry, acting illegally with its competitors in concert, is allowed to use arbitration, compelled by monopoly, in a forum set up by that same monopoly as a license to steal lines the brokerage houses' pockets with millions of dollars which under the law should and would be ordered returned to cheated investors. Mr. Dillard urges the Court to carefully-review the record of this case and to promptly issue order enjoining continued violation of the Sherman Act, 15 U.S.C.S. Sec. 1 et. seq.

Plaintiff respectfully prays that the Court will rule upon each and every motion in this case by written order and that hearing will be scheduled at the Court's earliest convenience, but only if the Court has any questions, and most importantly, Mr. Dillard urges that this Court should immediately issue order to enjoin enforcement of compulsory arbitration

provisions of Defendant's adhesion contracts due to clear violation of the Sherman Anti-Trust Act and other substantive Federal Law in the making of the agreement to arbitrate. Defendant has ignored Plaintiff's anti-trust charges because it cannot defend against them for they are true and correct in every respect. There is in the pleadings overwhelming weight of evidence of Federal anti-trust law violations by Defendant, and a total absence of any denial by Defendant of the facts presented by Plaintiff. The facts clearly indicate unreasonable and illegal restraint of trade by Defendant and its brokerage industry competitors acting in concert to illegally group boycott by concerted refusal to deal with Plaintiff and other consumers of services with deliberate intent that brokerage services be unavailable except under terms of similar unfair adhesion demand; that the Law and the Courts be subservient to arbitration panels organized by the

securities brokerage industry for the benefit of the securities brokerage industry. This Court should, by written order, declare the arbitration clause of the contract in question with Plaintiff to be null and void and order should be issued enjoining Defendant from attempting to enforce the adhesion arbitration clause against any and all of its other customers since it is apparent that like Federal anti-trust law violations occurred in the making of all Defendant's customer contracts.

WHEREFORE, PREMISES CONSIDERED, Plaintiff C. G. Dillard respectfully prays for immediate injunctive relief and for findings of fact and conclusions of law on the motions by written order of this Honorable Court, without hearing, unless hearing be requested by Defendant or hearing be in the opinion of the Court desirable.

Respectfully submitted,

C. G. Dillard, Plaintiff
118 Hoffman Way
Grants Pass, Oregon 97526
1-503-4741565

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Findings of Fact and Conclusions of Law Concerning Injunctive Relief and Other Previously Filed Motions has been delivered to:

Vinson & Elkins
Mr. Karl Stern
First City Tower
1001 Fannin
Houston, Texas 77002-6760

by hand delivery on this 11th day of February, 1983

BEST AVAILABLE COPY